SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 5, Original.

EX PARTE: IN THE MATTER OF HOLLON PARKER, PETITIONER.

RETURN TO RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE.

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1 IN THE SUPREME COURT OF THE UNITED STATES.

No. —. Original.

Ex Parte In the Matter of the Petition of HOLLON PARKER for a Writ of Mandamus

vs.

THE SUPREME COURT OF WASHINGTON TERRITORY, THOMAS BURKE, Chief Justice; the Honorables William G. Langford, Frank Allyn, and Lucius B. Nash, Associate Justices Thereof, Respondents.

Now come respondents and show, in answer to the petition herein and as cause why the mandamus asked by the petitioner, Hollon Parker, should not issue, the following:

That since the date of the petition herein the Honorable Richard, Jones, chief justice, has died, and the above-named Thomas Burke is now chief justice of the supreme court of said Territory.

That no present member of this court was a member thereof at the time that the said case of Parker *vs.* Dacres was deter-
2 mined, except Associate Justice Wm. G. Langford, who took no part therein.

That the defendant in error, George Dacres, did not appear in the district court after the entry of the alleged notice of appeal, except specially, as stated in his motion, of which the following is a copy:

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant.

Now comes the above-named defendant, by B. L. and J. L. Sharpstein, his attorneys, appearing specially for the purposes of this motion only, and moves the court for an order changing and modifying the pretended notice of appeal and journal entry in the above-entitled action, dated July 27, 1885, by adding after the words "At chambers," opposite the title of said action, the words "at
3 Olympia, Thurston county, Washington Territory;" and also by adding after the words "Done at chambers" and before the word *this* "this" the words "at Olympia, in Thurston county, Washington Territory," for the reason that such acts and each and every thereof were done and all said proceedings had at Olympia, in the county aforesaid.

This motion is based on the certificate of the judge of the above-entitled court, made this day and this day filed in said action.

B. L. AND J. L. SHARPSTEIN,
Attorneys for the Defendant, Appearing Specially for the Purpose of their Motion Only.

That the defendant in error, in filing his brief in the supreme court of Washington Territory, gave notice that he appeared specially, and that he moved the court to dismiss the appeal of plaintiff in error, Hollon Parker, which special appearance and motion was stated in said brief as follows:

4 The defendant in error, appearing specially, moves the court to dismiss the appeal herein for the following reasons:

1st. Because no notice of appeal was given or served in this action or given in open court or at chambers within six months after the rendition of the judgment herein or at any time.

Organic Act of Washington Territory, sec. 1874.
Code, sec. 2138.
The People *ex rel.* Newell and Others *vs.* Montgomery, Common Pleas, 18 Wendell, 649.
Packard *vs.* Packard, 7 Pacific Reporter, 628.
Earles *vs.* Earles, 27 Kansas, 538.

The defendant in error, not waiving his special appearance or motion herein, presents the following brief. Then came the brief of the defendant in error on the merits.

That the following is and was on January 5th, 1887, and for a long time prior thereto, one of the rules of said supreme court of said Territory and in full force at said time, viz:

"Any party to a cause pending in the supreme court who
5 shall in person or by attorney file a paper or any brief or shall receipt for papers filed in the cause without at the same time affirmatively, by written notice to the opposite party or the court, make a limited or special appearance in the cause, shall be held to have entered a general appearance in the supreme court and to have waived all objections to the jurisdictional process."

That the special and limited appearance of appellee, George Dacres, was in this case taken and stated under said rule in accordance with the uniform practice in said court.

Respondents have no knowledge or information sufficient to form a belief as to whether or not upon this motion the defendant in error raised or argued the single question of the right of Judge S. C. Wingard to order a notice of appeal to be spread upon the records of the first judicial district while out of his district.

That the argument made by the attorneys of the respective parties in the supreme court of Washington Territory was oral, and
6 defendants have no knowledge or information sufficient to form a belief as to whether or not on such argument the attorneys for defendant in error called the attention of the said court to section 2140 of the Code of Washington, which reads as follows:

"SECTION 2140. When a party to an action has appeared in the

same he shall be entitled to at least three days' notice of any trial, hearing, motion, or application to be had or made therein before any judge at chambers, which motion shall be in writing, setting forth the nature of the motion or application and the grounds thereof and specifying the time and place where the same will be made, and which may be on the adverse party or his attorney." The remainder of the section provides the manner of the service.

Respondents further show that said supreme court, after hearing said argument and the argument of said attorney for Hollon Parker, did grant the same, and rendered an opinion therein, which case and opinion of said court are reported as follows in the third
7 volume of Washington Territory Reports, page 12:

(Decided January 5, 1887.)

HOLLON PARKER *vs.* GEORGE D'ACRES.

Appeal. Notice. Dismissal.

Section 2140 of the code provides "that where a party to an action has appeared in the same he shall be entitled to at least three days' notice of any trial, hearing, motion, or application to be had or made therein before any judge at chambers, which notice shall be in writing," etc. Held, that where a notice of appeal under the act of 1883, not given in open court, was entertained by the judge, without the preliminary notice required by this section, the appeal should be dismissed.

Error to the district court holding terms at Walla Walla.

First district.

Motion to Dismiss the Appeal.

Messrs. B. L. and J. L. Sharpstein, for defendant in error, argued for the motion.

Mr. A. E. Isham, for the plaintiff in error, *contra.*

Per curiam: This motion to dismiss must be granted, because the notice of appeal, not being given in open court and being in
8 its nature an application for an order allowing the appeal, was entertained by the judge without the preliminary notice to the adverse party prescribed by section 2140 of the code.

And thereupon the court rendered judgment dismissing said appeal.

That since the granting of said motion and the dismissal of said appeal the said supreme court has construed the said act of 1883 and said section 2140 of said code, as appears by the following case, reported in third volume of Washington Territory Reports at page 14:

(Decided January 6, 1887.)

ALEXANDER MELVILLE, W. K. MELVILLE, and L. O. HAMILTON
v.
CHEHALIS COUNTY.

Appeal. Notice. Dismissal.

When there is nothing in the record to show that notice of appeal was given in open court or at chambers, or notice in the form provided in section 2140 of code, or that notice was waived, the appeal will be dismissed on motion.

Error to the district court holding terms at Montesano.

Second district.

The defendant in error appeared specially and moved to dismiss the appeal.

9 Mr. T. D. Scofield and Mr. N. S. Porter, for the defendant in error, in favor of the motion.

Mr. C. W. Hartman and Mr. D. P. Ballard, for the plaintiff in error, *contra.*

Mr. Chief Justice Greene delivered the opinion of the court:

Jurisdiction cannot be acquired by presumption. There is nothing in this record to certify us whether the notice of appeal was given in open court or at chambers. If at chambers, there should have been either the notice provided by section 2140 of the code or the actual presence of or waiver of notice by the opposite party. Nothing of the kind appears in the transcript, and the motion to dismiss the appeal must therefore be granted.

Turner, J., and Langford, J., concurred.

In addition to the foregoing, the respondents show the following, viz: That the alleged notice of appeal was given before the judge of the first judicial district while out of his district and in Thurston county, at Olympia, while in attendance on the supreme court
10 of Washington Territory, then in session. The organic act of Washington Territory, being section 1874 of the Revised Statutes of the United States, provides as follows:

"SECTION 1874. The judges of the supreme court of each Territory are authorized to hold court within their respective districts in the counties wherein, by the laws of the Territory, courts have been or may be established for the purpose of hearing and determining all matters and causes except those in which the United States is a party."

Section 2183 of the Code of Washington Territory provides as follows:

"SECTION 2183. The several judges of the district courts in this Territory and each of them, in their respective districts, may, at chambers, in vacation, entertain, try, hear, and determine all actions,

causes, motions, demurrers, and other matters not requiring a trial by jury."

Respondents, in addition to the foregoing, hereto attach and herewith return a duly certified copy of the record in said case
11 of Parker *vs.* Dacres, and also a certified copy of the rules of this court in force at the time of the judgment dismissing the appeal, and make the same a part hereof.

THOMAS BURKE,
Chief Justice.
FRANK ALLYN,
Associate Justice.
LUCIUS B. NASH,
Associate Justice.
WM. G. LANGFORD,
Associate Justice.

12 *Rules of the Supreme Court of the Territory of Washington. Adopted at July Term*, 1884.

OLYMPIA:

Printed at the Olympia Transcript office, 1884.

Officers of Supreme Court.

Name.	Office.	Residence.
Roger S. Green	Chief justice	Seattle.
Samuel C. Wingard	Associate justice	Walla Walla.
John P. Hoyt	Associate justice	Olympia.
George Turner	Associate justice	Yakima City.
R. G. O'Brien	Clerk	Olympia.
John B. Allen	U. S. attorney	Walla Walla.
Jesse W. George	U. S. marshal	Seattle.

Rules of the supreme court of the Territory of Washington. Adopted at July term, 1884.

I.—Transcripts.

Every transcript shall be plainly written on legal cap paper and be free from interlineations and erasures and be duly paged and prefixed with an alphabetical index to its contents, specifying the page of each separate paper, order, or proceeding and of the testimony of each witness, and have at least one blank fly leaf. Every
13 transcript consisting of more than one hundred leaves shall be bound by the clerk of the supreme court and the cost of binding taxed in the cause.

II.—Clerk's certificate.

Transcripts must be certified by the clerk of the district court in substantially the following form:

TERRITORY OF WASHINGTON, } ss:
—— *Judicial District,* }

I, —— ——, clerk of [title of the court], do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on appeal (or writ of error) to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and [SEAL.] the seal of said district court this — day of ——, 18—.

—— ——, *Clerk,*
By —— ——, *Deputy.*

III.—Form of transcripts.

Transcripts shall be made substantially in the manner following, to wit:

TERRITORY OF WASHINGTON, } ss:
—— *Judicial District,* }

In the District Court of the —— Judicial District, Holding Terms at ——.

A. B. }
vs.
C. D. }

[Here insert record.]

14 IV.—Modes of removing causes.

Cases that may be brought into this court, either under the provisions of the code or of the act entitled "An act in relation to the removal of causes to the supreme court," approved November 23d, 1883, and in cases of appeal taken under said act of 1883 no assignment of errors or specification of grievances shall be necessary.

V.—Assignment of errors.

In all cases of writs — errors taken under the provisions of the act entitled "An act in relation to the removal of causes to the supreme court," approved November 23d, 1883, an assignment of errors shall be made in writing and filed with the clerk of the proper district court, to be certified to this court as part of the record. Such assignment of errors shall be substantially the same as that provided for in section 458 of the code, and a copy thereof shall be served on the adverse party or his attorney within twenty days after the entry

in the journal of the district court of the notice of appeal. No formal joinder in error shall be required, but such joinder shall be deemed made upon the errors assigned.

15 VI.—Omissions may be supplied without leave.

If any paper or part of the record has been omitted from the transcript in any case such omission may be supplied at any time before the first day of the term by any party, without leave, by filing a properly certified transcript of such paper or part of the record.

VII.—Motions.

All motions in the supreme court must be in writing and filed with the clerk and served upon the adverse party or his attorney, unless service thereof be waived.

All motions for rule on the clerk to perfect transcripts, for leave to amend notices of appeal or writ of error, the proof of service thereof, or certificate of the clerk or judge to the transcript, or motion to dismiss a cause or affirm a judgment or decree without a hearing upon the merits must be filed on or before the second day of the term and not afterwards, unless by leave of the court the time be extended.

VIII.—Briefs to be furnished.

In all cases to be argued each party must furnish to the
16 court and opposite party printed briefs of his points and authorities. The points must be concisely and separately stated, and in citing authorities the names of volumes and titles of cases must be set out without abbreviation, and if text books of which more than one edition has been published are cited the number of the edition must be specified. One copy of each brief must be served upon the adverse party or his attorney. Ten copies shall be deposited with the clerk of the supreme court, one of which shall be filed in the case and the remainder safely kept, to be disposed of as this court may direct.

IX.—Dimensions of briefs.

Briefs required by the preceeding rule must be of the following dimensions, to wit: 8½ inches from top to bottom; 6½ inches from edge to edge, inclusive of the margin, which must be 1½ inches at the top, bottom, and outer edge of each printed page. The title of the cause and endorsements must be on the left half of the back cover.

X.—Time of filing and service of briefs.

In all cases the time for filing and service of briefs shall be for appellants and plaintiffs in error at least twenty days, and for
17 appellees and defendants in error at least five days before the first day of term; and in all cases reply briefs (if any) must be filed and served on or before the first day of term.

XI.—Technical objections to hearing on merits.

Exceptions or objections to transcript, bonds, notices of appeal, or writ of error or the service thereof, or to writs of error or the return thereof, and all technical exceptions or objections to the record tending to prevent the hearing of a cause upon its merits must be taken and plainly stated in the printed briefs of appellees or defendants in error, or the same will not be regarded; and when so taken and specified appellants and plaintiffs in error must present and file, on or before the second day of the term, such additional or amended record, certificate, affidavit, or other matter, if such there be, as shall be required to remove or answer the exception or objection so taken, unless further time be granted by the court for cause shown.

XII.—Arguments.

No more than two counsel on a side will be heard upon the argument of any question unless the court shall direct otherwise, provided that each party who has appeared separately and by different counsel in the district court shall, if he so desire, be heard through his own counsel. The counsel for the appellant or plaintiff in error shall be entitled to open and close the argument upon the merits in all cases. In argument of motions and all preliminary or collateral matters the counsel for the party having the affirmative of the issue shall open and close. Arguments upon the merits shall be limited to two hours upon a side, and all other arguments to one hour upon a side, unless an extension of time be obtained from the court before the argument is commenced.

18

XIII.—Opinions to be recorded.

All opinions of the court shall be recorded by the clerk in a well-bound volume.

XIV.—Filing petitions for rehearing.

Every petition for a rehearing must be filed before the close of the term at which the decision is made, and no more than one petition for a rehearing of the same question shall be filed, provided that the court may in its discretion allow any petition to be amended.

19

XV.—Remittitur.

In all cases remanded the clerk of the supreme court shall, within ten days after the close of the term, issue and transmit to the clerk of the district court a remittitur; and in all cases wherein the judgment, order, or decree of the district court is reversed or modified the remittitur shall be accompanied by a certified copy of the opinion of the supreme court in the case.

XVI.—Papers not to be taken from clerk's office.

No paper filed in the supreme court shall be taken from the court-room or clerk's office, except by permission of the court or one of the justices, and when so taken a receipt in writing therefor must be left with the clerk. Permission to take papers will not be granted except to a party or his attorney who shall have entered a general appearance in the supreme court in the cause in which such paper is filed.

XVII.—Special appearances.

Any party to a cause pending in the supreme court who
20 shall, in person or by attorney, file a brief or any paper, or shall receipt for papers filed in the cause, without at the same time affirmatively, by written notice to the opposite party or the court, make a limited or special appearance in the cause, shall be held to have entered a general appearance in the supreme court and to have waived all objections to the jurisdictional process.

XVIII.—Expense of briefs to be taxed as costs.

The expense of printing briefs of the prevailing party, not exceeding fifteen dollars, unless larger sums shall be allowed by leave of the court, shall be taxed as other costs.

XIX.—Advance costs.

The clerk of the supreme court may require the appellant or plaintiff in error to advance fees in the sum of ten dollars in each case, and shall not be required to docket any case until such advance be paid.

XX.—Criminal cases.

The foregoing rules shall apply to criminal as well as civil causes.

XXI.—Evidence in admiralty causes.

In all cases of appeal in admiralty causes the evidence
21 shall be certified to this court in its original form and not by transcript.

TERRITORY OF WASHINGTON, } ss:
County of Thurston, }

I, Francis Henry, clerk of the supreme court of Washington Territory, hereby certify that the within and foregoing is a full and true copy of the rules of said supreme court in force on July 14th, 1885, the date of the judgement rendered by said court in the case of Hollon Parker *vs.* George Dacres.

In witness whereof I have hereunto set my hand and the seal of said court this 16th day of January, A. D. 1889.

[Seal of Sup. C't Wash. Ter.]

FRANCIS HENRY,
Clerk of the Supreme Court, Wash. Ter.

22 In the Supreme Court of Washington Territory.

HOLLON PARKER, Plaintiff in Error,
vs.
GEORGE DACRES, Defendant in Error.

Now comes the defendant in error, who appears specially for the purpose of this motion only, and moves the court to strike out the pretended statement of errors and to dismiss the appeal herein for the following reasons:

Because no assignment of error was made or filed with the clerk of the district court by the plaintiff in error or served on the adverse party or his attorneys or either of them within twenty days after the entry of the notice of appeal in the journal of the district court.

B. L. & J. L. SHARPSTEIN,
Attorneys for the Defendant in Error, who Appear
23 *Specially for the Purpose of this Motion Only.*

I hereby admit service of the within motion by copy, in Walla Walla city and county, Washington Territory, this the 8th day of July, 1885.

A. E. ISHAM,
Attorney for Plaintiff in Error.

Endorsed: In the supreme court. Hollon Parker *vs.* George Dacres. Notice to dismiss appeal. Received and filed Jul- 10, 1885. R. G. O'Brien, clerk. B. L. & J. L. Sharpstein, attorneys for defendant in error.

In the Supreme Court of Washington Territory.

HOLLON PARKER, Plaintiff in Error,
vs.
GEORGE DACRES, Defendant in Error.

24 Now comes the defendant in error, who appears specially for the purpose of this motion only, and moves the court to strike out the pretended assignment of errors and to dismiss the appeal in this action for the reasons that said pretended assignment of errors was not filed in the district court or served on the defendant in error or his attorneys or either of them within twenty days after the entry of the notice of appeal in the journal of the district court, and no assignment of errors was made or filed with the clerk of the district court or served on the adverse party or his attorneys or either of them within twenty days after the entry of the notice of appeal in the journal of the district court, and to dismiss the appeal because there is no transcript of the record properly certified to by the clerk of the district court filed herein.

B. L. & J. L. SHARPSTEIN,
Attorneys for the Defendant in Error, Appearing
25 *Specially for the Purpose of this Motion Only.*

I hereby accept service of the foregoing motion, at Olympia, Washington Territory, this 13th day of July, 1885, and waive copy.

A. E. ISHAM,
Attorney for Plaintiff in Error.

Endorsed: In the supreme court of the Territory of Washington. Hollon Parker, pl'ff in error, *vs.* George Dacres, def't in error. Motion to dismiss. Filed July 13th, 1885. R. G. O'Brien, clerk.

In the Supreme Court of W. T. January Term, 1887.

HOLLON PARKER, Plaintiff in Error,
vs.
GEORGE DACRES, Def't in Error.
} # 474. Cost Bill.

26	Clerk's fees	$9 75
	Binding transcript	2 00
	Sheriff's fee	
	Printing brief	11 25
	Attorney'-fee	10 00
	Miscellaneous fees	
	Total	$33 00

TERRITORY OF WASHINGTON,
County of Thurston,
} *ss:*

B. L. Sharpstein, being first duly sworn, says that he is of counsel for the defendant in error in the above-entitled cause, and that the foregoing is a true exhibit of the costs and disbursements necessarily incurred and expended in said cause and court, and that the same is true as he verily believes.

B. L. SHARPSTEIN.

Subscribed and sworn to before me this 10th day of Jan., 1887.

R. G. O'BRIEN, *Clerk.*

27 TERRITORY OF WASHINGTON,
County of Walla Walla,
} *ss:*

I, Archer S. Bowles, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within brief on the writ of error in said county, on the 21st day of June, A. D. 1886, by then and there delivering to J. L. Sharpstein, one of the attorneys for defendant in error, a true copy of said brief in the case of Hollon Parker, plaintiff in error, *vs.* George Dacres, defendant in error.

Dated this 21st day of June, A. D. 1886.

ARCHER S. BOWLES,
Sheriff of Walla Walla County, W. T.,
By CHAS. LAMPKIN, *Deputy.*

In the Supreme Court of Washington Territory. July Term, A. D. 1886.

HOLLON PARKER, Plaintiff in Error, *vs.* GEORGE DACRES, Defendant in Error. } Writ of Error to First Judicial District.

28 I.

A sale is void when it is shown by the records to have been made in a different manner from that pres-ribed in the judgment by which it was authorized.

Roer on Judicial Sales, sec. 813; *id.*, 824.

The service was made by the sheriff, and not by the United States marshal or by any one appointed by him, and no affidavit was made to the return.

General Laws W. T., 1873, p. 1, sec. 2.
Rules of Practice for the Courts of Equity of the United States, Rules No-. 15 & 18.
Bump's Federal Procedure, p. 804–'5, No-. 15, 18.
Rover on Judicial Sales, sec-. 751, '2, & '3; *id.*, 494.
Tettell *vs.* Allison, 21 Wall., 289.

II.

29 The writ of execution should have run in the name of the United States.

Laws W. T., 1873, sec. 322, p. 85; *id.*, sec. 320.
Rule of Practice for the Courts of Equity of the United States, No. 8.
Bump's Federal Procedure, p. 305.

A judicial sale under a decree in equity is void if made by a different master than the one named in the decree.

Rover on Judicial Sales, sec. 555.
Yates *vs.* Woodruff, 4th Edw., ch. 700.

And a confirmation of sale does not divest title or avoid the necessity of a legal deed.

Freeman on Executions, sec. 311.
Freeman on Executions, sec. 339.
French *vs.* Edwards, 13 Wall., 506.

III.

The return of service upon the defendant must designate that it was made upon the defendant. This rule would apply equally to the return of a subpœna in chancery.

30 Murfree on Sheriffs, secs. 840, 843, 844, 845, 849.
XI U. S. Digest, p. 255, notes 982, 983, 986, 1003–'4.
Id., Baker *vs.* Chaplin, 12th Iowa, 204.

Bain *vs.* Galyear, 10th *id.*, 585.
Ayres *vs.* Scott, Sneed (Ky.), 187.
Gully *vs.* Sanders, Litt. (Ky.), Sel. Cas., 423.
Kibbe *vs.* Dening, 1 Litt. (Ky.), 244.
Parker *vs.* Grayson, 1 Nott. & N. (Le.), 171.
Stevens *vs.* Price, 16 Tex., 572.

IV.

A sheriff's return must show an exact compliance with the statute.

U. S. Dig. 1881, p. 885, 2.
Grantern *vs.* Rosencrance, 27th Wis., 488.
Hakes *vs.* Shupe *et al.*, 27th Iowa, 465.
Gilbaugh *vs.* Keller, 11 Phila. (Pa.), 364.
U. S. Diff., 1871, p. 575, N. 30.
Rankin *vs.* Dulaney, 43 Miss., 197.
Noron *vs.* Coates, *id.*, 225.
Noron *vs.* Gwin, *id.*, 346.

31 V.

The clerk and registers, under the law, issue a subpœna in chancery.

In this case W. H. Andrews, clerk, filed the complaint, and the subpœna was returned as served — B. W. Griffin, sheriff, by F. Kimmerly, deputy.

We contend that this return was not made by any person known to the law. The order made by J. R. Lewis, judge, filed Sept. 1st, 1873, adjudging that the bill be taken *pro confesso*, was made on an insufficient return of the subpœna in chancery.

The order of reference was made to W. A. George, master, and filed by W. H. Andrews, clerk.

The order of confirmation of sale by sheriff of Walla Walla county was filed by clerk Sept. 14th, 1874.

Sheriff's sale of real estate published in the Walla Walla Union, signed "Given under my hand this July 4th, 1874, B. W. Griffin, sheriff Walla Walla county, by F. Kimmerly, deputy."

32 VI.

The return of sale was made by B. W. Griffin, sheriff, by Kimmerly, deputy. No affidavit of the return was made by any person.

VII.

The decree appoints the sheriff of Walla Walla county as a special master in chancery to make the sale, and the sale was made by B. W. Griffin, sheriff, by F. Kimmerly, deputy, and the sale was confirmed by the court as a sale made by the sheriff of Walla Walla county.

The decree provides, among other things, that the premises be ad-

vertised and sold by said master as upon execution, according to the laws of Washington Territory; that the master execute and deliver to the purchaser a good and sufficient deed; that the possession of the premises be delivered up to the purchaser upon the production of the master's deed. No such deed has ever been executed
33 or delivered by the master in chancery, and no such deed has ever been produced and the possession of said premises demanded thereunder.

The decree provides that a certified copy of the decree, certified to by the register in chancery of the court, shall be a sufficient process. It was certified to by the clerk of the court and not by the register. The decree and records do not show that the default of the defendant was ever taken or entered.

VIII.

The court erred in admitting the evidence of George Dacres, defendant, in regard to his being present at the sale and Edward Sheil being present; also in regard to the admission of the conversation between defendant and Sheil, and being put in possession of the premises by Sheil after the sale. No such evidence could be admissable except under a plea of estoppel *in pais*. No attempt
34 was made in the answer to set up such a plea.

Equitable actions and defenses must be specifically pleaded in an action at law.

Clark *vs.* Huber, 25 Cal., 593.
Corkhill *vs.* Landers, 44 Barb., 218.
Phila. R. R. Co. *vs.* Howard, 13 How. U. S., 308.

A. E. ISHAM,
Attorney for Plaintiff in Error.

Endorsed: #474. In the supreme court of Washington Territory. July term, A. D. 1886. Hollon Parker, plaintiff in error, *vs.* George Dacres, defendant in error. Writ of error to first judicial district. Action of ejectment. A. E. Isham, attorney for plaintiff in error. Received and filed Jun- 22, 1886. R. G. O'Brien, clerk.

35 In the Supreme Court of Washington Territory. July Term A. D. 1886.

HOLLON PARKER, Plaintiff in Error,
vs.
GEORGE DACRES, Defendant in Error,
} Appeal from First Judicial District.

Brief of Defendant in Error.

The defendant in error, appearing specially, moves the court to dismiss the appeal herein for the following reason:

1st. Because no notice of appeal was given or served in this action or given in open court or at chambers within six months after the rendition of the judgment herein or at any time.

Organic act of Washington Territory, sec. 1874; Code, sec. 2138.

The People *ex rel.* Newell and others *vs.* Montgomery Common Pleas, 18 Wendell, 649.
Packard *vs.* Packard, 7 Pacific Reporter, 628.
36 Earls *vs.* Earls, 27 Kansas, 538.

The defendant in error, not waiving his special appearance of motion herein, presents the following brief:

Statement.

The plaintiff claims to recover the property described in the complaint as owner in fee. The defendant denies plaintiff's title and sets up title in himself.

Plaintiff offered in evidence trust deeds marked Ex. 5 & 6, dated, respectively, Oct. 1, 1874, and April 29, 1876; which were each objected to by defendant on the ground that they did not prove or tend to prove the title alleged in plaintiff's complaint; which objection was overruled, and exception asked by defendant and allowed.

Plaintiff then offered some evidence in relation to the value of the rents, issues, and profits of the land in controversy and rested his case.

Defendant then offered evidence to prove that on the 4th
37 day of August, 1874, the property described in plaintiff's complaint was sold at judicial sale under a decree in the case of Almos H. Reynolds *vs.* Edward Sheil, defendant; that said Sheil, defendant, was present at said sale and made no objection to the sale, and that in about one week after the sale said Sheil delivered possession of the premises to this defendant, who was the purchaser at said judicial sale; that the defendant in this action has ever since held said premises under and in pursuance of said judicial sale. Plaintiff excepted to said evidence.

Defendant then offered in evidence a transcript of the record in the case of Almos H. Reynolds *vs.* Edward Sheil, marked Ex. 8.

Plaintiff objected on the ground that the same was immaterial, irrelevant, and incompetent; objection overruled, and excepted to.
Defendant then offered in evidence sheriff's deed for the premises sold.

38 Plaintiff objected on the ground that it was made by a sheriff instead of a master in chancery and without authority in law; objection overruled and exception taken.

Defendant then rested and the case was submitted, when the court instructed the jury as follows:

"Gentlemen of the jury: I instruct you that upon the whole evidence the defendant is entitled to a verdict;" to which plaintiff excepted.

Argument.

The decree of the district court directs that the sheriff of Walla Walla county make sale of the mortgaged premises; a process so directed may be executed by the sheriff or his deputy.

Seeley *et al. vs.* Manning, 37 Wis., 574; Rover on Judicial Sales (1st ed.), secs. 592 and 1022.

Herman on Executions, p. 202.

39 II.

We think the sale would not be void if it were a fact that it was made by a different officer from that named in the decree.

Robert Hogan *vs.* Azro Hoyt and others, 37 New York, 300.

Seeley *et al. vs.* Manning, 37 Wisconsin, 574.

III.

A certified copy of the decree was sufficient process for the sheriff to make the sale.

Laws of 1873, sec. 557.

IV.

The order of the district court confirming the sale is, as to parties to this action, conclusive of the regularity of the proceedings concerning such sale.

Statutes 1873, sec. 361, subdivision 4.

John Voorhees *et al. vs.* James Jackson *et al.*, 10 Peters, 449 (12 Curtis, 193).

Koehler *vs.* Ball, 2 Kansas, 160.

Herman on Executions, page 434 (sec. 261).

40 Rover on Judicial Sales, 1st ed., secs. 122–127 and 132.

V.

The evidence that Sheil, the defendent in the foreclosure suit, was present at the sale and made no objection and placed the purchaser in possession was properly admitted in evidence, and neither Sheil or any party claiming an interest in the premises under him, acquired since the sale, have a right to impeach the same.

Wood *vs.* Colvin, 2 Hill, 566.

Noe *vs.* Richard, 5 Yeager, 216.

Bronson's Executor *vs.* Chappell, 12 Wallace, 681.

The declarations and acts of a party while in possession of real or personal property are always admissable to show the nature or character of his possession or title.

John Chadwick *vs.* John Former *et al.*, 69 New York, 404.

Kelly *vs.* Kelly, 20 Wisconsin, 443.

VI.

The purchaser at a judicial sale is entitled to possession
41 of the property purchased from the day of sale.

Statutes 1873, page 103, sections 372 and 565.

VII.

The district court, in the case of Reynolds *vs.* Sheil, adjudged that the subpœna, together with the bill, was personally served on Edward Sheil, the defendant, on July 9th, 1873, in Walla Walla county, and that judgment is conclusive, not only of the service, but that the person served was Edward Sheil, the defendant, until reversed or set aside in a direct proceeding.

Freeman on Judgment (3d ed.), secs. 126, 130, 131, 132, 133, and 134.
Ludlow *vs.* Ramsey, 11 Wallace, 581.
The People on the Relation of Davis & Palmer *vs.* Sturtevant 9 New York, 263.

VIII.

It is conclusively presumed that all proof necessary was duly made (when the record shows nothing to the contrary).

42 Alderson *vs.* Bier and Wife, 9 California, 320.
Foot *et al. vs.* Stevans, 17 Wendell's Reports, 483.
Kennedy *vs.* The Bank of the State of Georgia *et al.*, 8 Howard, 586 (17 Curtis, 714).

IX.

Plaintiff alleged a fee-simple title. He should prove it substantially as alleged, and, having failed in this, the instruction of the court, independently of any evidence offered by defendant, was correct.

Eagen *et al. vs.* Delaney *et al.*, 16 California, 85.
Stineback *vs.* Fitzgerald *et al.*, 12 California, 295.
Barclay *vs.* Yeomans, 27 Wisconsin, 682.
Gillett *vs.* Stanley, 1 Hill, 121.
Cole *et al. vs.* Irvine, 6 Hill, 634.
Holmes *vs.* Seeley, 17 Wendell, 75.

B. L. & J. L. SHARPSTEIN,
Attorneys for Defendant in Error.

43 Endorsed: # 474. In the supreme court of Washington Territory. July term, A. D. 1886. Hollon Parker, plaintiff in error, *vs.* George Dacres, defendant in error. Appeal from first judicial district. Brief of defendant in error. B. L. & J. L. Sharpstein, attorneys for defendant in error. Received and filed Jul- 1, 1886. R. G. O'Brien, clerk.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I hereby admit the within-named brief to have been served in the within-named action, reserving all rights to object, by motion or otherwise, to the appeal or writ of error being taken as by law
44 required and not appearing in the action for any purpose or waiving any right or privilege whatever.

J. L. SHARPSTEIN,
Of Attorneys for Defendant in Error.

In the Supreme Court of Washington Territory. July Term, A. D. 1886.

HOLLON PARKER, Plaintiff in Error,

vs.

GEORGE DACRES, Defendants in Error.

Plaintiff in Error'- Reply Brief.

The statute of 1883 does not prevent a judge from signing an order of a notice of appeal out of his district. The facts are in this case, as shown by the records, that S. C. Wingard, judge of the first judicial district, was in attendance upon the supreme court, and required in his official duties to remain there. If he could not
45 act at chambers and sign an order of appeal it would deprive the plaintiff in error of the right of appeal within the six months' statutory time.

This is an *ex parte* application for an order to be entered upon the journal giving a notice of appeal, and the judge had jurisdiction to grant or make such order anywhere within the State or Territory in which he was a duly elected or appointed judge.

Fourth Wait's Practice, p. 592.
Third *ib.*, 293.
Second Johns, 198.
Edwards on Receivers, p. 14, 15.

In such matters, where no trial or judgment upon the merits is required, the judge has the right, as he did in this case, to act in any place within the Territory where he may be found.

A. E. ISHAM,
Attorney for Plaintiff in Error.

46 Endorsed: 474. In the supreme court of Washington Territory. July term, A. D. 1886. Hollon Parker, plaintiff in error, *vs.* George Dacres, defendant in error. Plaintiff in error'- reply brief. A. E. Isham, attorney for plaintiff in error. Received and filed Jul- 12, 1886. R. G. O'Brien, clerk.

(Pp. 47, 48, & 49, being index to transcript from dist. c't, omitted in printing. See general index.)

50 TERRITORY OF WASHINGTON, } *ss:*
First Judicial District, }

In the District Court of the First Judicial District, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant.

51 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant.

The United States of America to George Dacres, defendant:

You are hereby required to appear in an action brought against you by Hollon Parker, plaintiff, in the district court of the Territory of Washington and for the first judicial district thereof, holding terms at Walla Walla for the counties of Walla Walla and Franklin, in said Territory, to answer the complaint of plaintiff, filed in Walla Walla county, within twenty days after the service of this summons, exclusive of the day of service, if served in said counties; if
52 not served in said counties, but in said district, in thirty days; if served in any other judicial district in the Territory, in forty days; if served by publication, within sixty days after first publication of this summons, or the said plaintiff will take judgment against you by default, according to the prayer of the complaint.

Witness the Hon. S. C. Wingard, associate justice of the supreme court of Washington Territory and judge of said court, [SEAL.] and the seal thereof, affixed this 24th day of May, A. D. 1884.

A. REEVES AYRES, *Clerk,*
By —— ——, *Deputy.*

A. E. ISHAM,
Plaintiff's Attorney.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, James B. Thompson, sheriff of Walla Walla county,
53 Washington Territory, do hereby certify that I served the within summons and annexed complaint on the within-named defendant, George Dacres, in Walla Walla county, Washington Territory, on the 26th day of May, A. D. 1884, by then and there delivering to said defendant personally a copy of said summons, and that I at the same time and place delivered to said defendant personally, with said copy of summons, a copy of the complaint in said action.

JAMES B. THOMPSON,
Sheriff of Walla Walla County, W. T.,
By —— ——, *Deputy.*

Endorsed: Case No. 3957. Summons. In the district court of the Territory of Washington and for the first judicial district thereof, holding terms at Walla Walla for the counties of Walla Walla and

Franklin, in said Territory. Hollon Parker, plaintiff,
54 *vs.* George Dacres, defendant. Returned and filed this 26th day of May, A. D. 1885. A. Reeves Ayres, clerk, by F. W. Goodhue, deputy. Sh'ff's fees, $1.20.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Pl'ff, *vs.* GEORGE DACRES, Def't.

Ejectment.

The plaintiff complains and alleges—

1st. That on the 28th day of Dec., A. D. 1874, he was and ever since has been the owner and seized in fee of that certain tract of land situated in the county of Walla Walla, Washington
55 Territory, and more particularly described as follows, to wit: The N. E. ¼ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ of sec. # 20, and the S. W. ¼ of sec. # 17, T. # 7 north, range # 36 east.

2nd. That while plaintiff was so seized the defendant afterwards, on the 28th day of December, A. D. 1874, enter- into possession of the demanded premises, and now and ever since said date unlawfully and wrongfully withheld the possession thereof from the plaintiff, to his damage in the sum of $22,500.00.

3rd. That the value of the rents, issues, and profits of said premises from the said 28th day of December, A. D. 1874, during said time, per year, and while the plaintiff has been excluded therefrom by the defendant, is $2,400.00, making during the whole time the sum of $22,500.00.

Wherefore the plaintiff prays judgment against the defendant—
1st. For the recovery of the possession of the demanded
56 premises; 2nd, for the sum of $22,500.00, the value of the rents, issues, and profits, and costs and disbursements of suit, and legal interest thereon.

A. E. ISHAM,
Pl'ff's Att'y.

TERRITORY OF WASHINGTON, } ss:
Walla Walla County, }

I, Hollon Parker, being first duly sworn, depose and say: I am the plaintiff in the above-entitled action and know the contents of the foregoing complaint and believe the same to be true.

H. PARKER.

Subscribed and sworn to before me this the 15th day of May, A. D. 1884.

A. REEVES AYRES,
Clerk District Court.

Endorsed: Complaint. Filed May 15, 1884. A. Reeves Ayres, clerk district court.

57 In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant.

Defendant, answering the complaint of plaintiff herein, denies each and every allegation thereof.

Wherefore defendant asks judgment for his costs and disbursements herein.

B. L. & J. L. SHARPSTEIN,
Attorneys for Defendant.

TERRITORY OF WASHINGTON, } ss:
Walla Walla County, }

George Dacres, being first duly sworn, deposes and says he is the defendant above named and knows the contents of the fore-
58 going answer and believes the same to be true.

GEORGE DACRES.

Subscribed and sworn to before me this 27th day of May, 1884.

J. L. SHARPSTEIN,
[SEAL.] *Notary Public.*

Endorsed: Answer. Filed May 29th, 1884. A. Reeves Ayres, clerk, by F. W. Goodhue, deputy.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant.

Defendant, for amended answer to plaintiff's complaint herein—

First. Denies each and every allegation of said complaint.

Second. Alleges, for a further and separate answer and de-
59 fense, that the defendant was, on the 17th day of July, 1876, and ever since has been and still is the owner of the premises described in plaintiff's complaint, and ever since said date has been and now is seized in fee of the said premises and every part thereof,

Third. That the said premises described in plaintiff's complaint were, on the 4th day of August, 1874, sold at a judicial sale by virtue of and in pursuance of a judgment and decree of this court made on the 27th day of June, 1874, in a certain suit or action then pending in said court, wherein Almos H. Reynolds was plaintiff and Edward Sheil and others were defendants, and the defendant became the purchaser of said premises at such judicial sale, and by

virtue thereof then and there took possession of the said premises and ever since has held possession of the same as such purchaser; that since said purchase the said defendant has made per-
60 manent improvements upon said premises of the value of six thousand dollars.

Wherefore defendant prays judgment that the action be dismissed and for his costs and disbursements herein.

B. L. & J. L. SHARPSTEIN,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

George Dacres, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he knows the contents of the foregoing amended answer and believes the same true.

GEORGE DACRES.

Subscribed and sworn to before me this 12th day of November, 1884.

W. H. REED,
[SEAL.] *Notary Public, Washington Territory.*

Due service of the foregoing amended answer admitted this
61 12th day of November, 1884.

A. E. ISHAM,
Attorney for Plaintiff.

Endorsed: Amended answer. Filed Nov. 12, 1884. A. Reeves Ayres, clerk, by F. W. Goodhue, deputy.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Pl'ff, *vs.* GEORGE DACRES, Def't.

Now comes the above-named plaintiff and for reply to defendant's amended answer—

1st. Denies each and every allegation thereof.

2nd. Denies that defendant put any improvement upon
62 the premises described in complaint with the knowledge and consent of plaintiff or by his procurement or authority.

Wherefore plaintiff reiterates the prayer of his complaint.

A. E. ISHAM,
Pl'ff's Att'y.

WASHINGTON TERRITORY, } ss:
Walla Walla County, }

Hollon Parker, being first duly sworn, deposes and says: I am the plaintiff above-named and know the contents of the foregoing complaint and believe the same to be true.

H. PARKER.

Subscribed and sworn to before me this 15th day of Nov., 1884.
A. REEVES AYRES,
Clerk District Court.

Endorsed: Reply. Filed Nov. 15, 1884. A. Reeves Ayres, clerk.

63 In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Pl'ff, *vs.* GEORGE DACRES, Def't.

Now comes the above-named plaintiff in the above-entitled action and moves the court to vacate and set aside the verdict of the jury rendered in said action in favor of the defendant and against the plaintiff on the 26th day of November, A. D. 1884, and grant a new trial in said action on the following grounds, to wit: 1st, insufficiency of the evidence to justify the verdict, and that the same is against law.

The verdict was insufficient in this, that the certified copy put in evidence of the case wherein Almos Reynolds was plaintiff and Edward Sheil was defendant, and marked Exhibit (8), did not
64 show any legal transfer of the title to the property described in the complaint in this action, by judicial sale or otherwise, to the defendant, and in legal service of the writ of subpœna on the defendant, Edward Sheil, in said action and in legal decree against him on his property, and the deed put in evidence from B. W. Griffin to George Dacres, marked Ex. (7), did not show any transfer of the title or any interest in the property described in the complaint to the defendant.

That the deeds and patents marked Ex. 1, 2, 3, 4, 5, 6 and put in evidence did show a good and sufficient title in and to the property in plaintiff.

2nd. Errors in law excepted to at the time by the plaintiff:

1st. The court erred in admitting in evidence the certified copy of the papers in the case of Almos H. Reynolds *vs.* Edward Sheil, marked Ex. (8).

2nd. The court erred in admitting the evidence of the defend-
65 ant Dacres in regard to any conversation that he had with the said Edward Sheil, either before or after the pretended sale of the property in complaint named, and erred in allowing in evidence any acts or conduct of said Sheil tending to show that he consented or directed said Dacres to enter upon or take possession of said property.

3rd. The court erred in admitting in evidence the deed of B. W. Griffin to George Dacres, marked Ex. (7).

4th. The court erred in instructing the jury "that upon the whole evidence the defendant is entitled to a verdict."

A. E. ISHAM,
Att'y for Hollon Parker, Plaintiff.

Service accepted of the within motion for new trial and copy received.

B. L. & J. L. SHARPSTEIN,
Atty's for Def't.

Nov. 28, 1884.

66 Endorsed: Motion for new trial. Filed Nov. 28, 1884. A. Reeves Ayres, clerk.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant.

Assignment of Errors on Appeal to the Supreme Court.

1st. The evidence was insufficient to justify the verdict of the jury in this, that the certified copy put in evidence of the case wherein Almos Reynolds was plaintiff and Edward Sheil was defendant, and marked Exhibit (8), did not show any legal transfer of the title to the property described in the complaint in this action, by judicial sale or otherwise, to the defendant, and no legal service of the writ of subpœna on the defendant, Edward Sheil, in
67 said action, and no legal decree against him or his property, and the deed put in evidence from B. W. Griffin to George Dacres, marked Ex. B, did not show any transfer of the title or interest in the property described in the complaint to defendant.

That the deeds and papers marked Ex. 1, 2, 3, 4, 5, 6 and put in evidence did show a good and sufficient title in and to the property in the plaintiff.

Errors in law excepted to at the time by the plaintiff:

1st. The court erred in admitting in evidence the certified copy of the papers in the case of Almos Reynolds *vs.* Edward Sheil, marked Ex. (8).

2nd. The court erred in admitting the evidence of def't Dacres in regard to any conversation that he had with the said Edward Sheil, either before or after the pretended sale of the property in complaint named, and erred in allowing in evidence any acts
68 or conduct or words tending to show that he consented or directed said Dacres to enter upon or take possession of said property.

3rd. The court erred in admitting in evidence the deed of B. W. Griffin to George Dacres, marked (Ex. 7).

4th. The court erred in instructing the jury that upon the whole evidence the defendant is entitled to a verdict.

A. E. ISHAM,
Attorney for Hollon Parker, Pl'ff.

August 12, 1885.

Endorsed: Assignment of errors. Filed Aug. 12, 1885. A. Reeves Ayres, clerk, by F. W. Goodhue, deputy.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Archer S. Bowles, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within assign-
69 ment of errors on the within-named defendant, George Dacres, in Walla Walla county, Washington Territory, on the 12th day of August, A. D. 1885, by then and there delivering to John L. Sharpstein, one of the attorneys for said defendant, personally, a copy of said assignment of errors in said action.

ARCHER S. BOWLES,
Sheriff Walla Walla County, W. T.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

Be it remembered that at the regular November term, 1884, of the district court of Washington Territory and for the first judicial district thereof, holding terms at Walla Walla, Walla Walla county, in said Territory, begun and held at city of Walla Walla, on Monday, the tenth day of November, A. D. 1884—Hon. S. C. Wingard, sole judge presiding—among other the following proceedings were had, to wit:

Third Judicial Day.

70 WEDNESDAY, *November* 12, 1884.

HOLLON PARKER, Plaintiff, } # 3959.
vs.
GEORGE DACRES, Defendant. }

Now, on this day, this cause came on for hearing on motion of defendant for leave to amend his answer, and the said motion was granted and leave given defendant to amend his said answer.

(Signed) S. C. WINGARD, *Judge, etc.*

Fourteenth Judicial Day.

TUESDAY, *Nov.* 25, 1884.

HOLLON PARKER, Plaintiff, } # 3959.
vs.
GEORGE DACRES, Defendant. }

71 Now, on this day, this cause coming on for trial, A. E. Isham appearing as attorney for plaintiff and B. L. & J. L. Sharpstein as attorneys for the defendant, and a jury being called and duly answered to their names and were sworn, to wit:

N. Snodgrass,	O. P. Howard,
J. T. Meade,	W. D. Plants,
J. F. Seeber,	Fac. Woodward,
T. J. Hollowell,	George Smails,
O. J. Laman,	D. C. Reese,
Joseph Forrest,	Olliver Allore,

and thereupon the cause proceeded by hearing the evidence till the hour of adjournment, when the jury, being admonished by the court, were allowed to separate till the incoming of court to-morrow morning.

(Signed) S. C. WINGARD, *Judge, &c.*

Fifteenth Judicial Day.

WEDNESDAY, *Nov.* 26, 1884.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant. } # 3959.

72 Now, on this day, this cause again coming on, the jury in the case, being called, answer to their names, and thereupon the cause proceeded by hearing the evidence and arguments of counsel till the close of the same, when the jury, being charged by the court, retired in charge of a duly sworn officer to deliberate on their verdict.

And now, after due deliberation, the said jury come into open court, and, being called, answer to their names, and return the following verdict, to wit:

HOLLON PARKER, Pl'ff, *vs.* GEORGE DACRES, Def't. } Action to Recover Real Estate.

"We, the jury empanelled in the above-entitled case, find that the plaintiff is not entitled to the possession of the property described in the complaint, and that the defendant is the owner
73 in fee simple of said premises and every part thereof.

"NELSON SNODGRASS, *Foreman.*"

Whereupon counsel for plaintiff gave notice of a motion for new trial.

(Signed) S. C. WINGARD, *Judge, &c.*

Seventeenth Judicial Day.

SATURDAY, *November* 29, 1884.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant.

Now, on this day, this cause came on for hearing on motion of plaintiff for a new trial herein, and the said motion was argued by respective counsel and overruled by the court, the court being duly advised in the premises; to which ruling of the court plain-
74 tiff, by his counsel, duly excepted, and exception allowed by the court.

(Signed) S. C. WINGARD, *Judge, &c.*

At chambers, at Olympia, Thurston county, Washington Territory, July 27, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant. } # 3959. Notice of Appeal.

Comes now the above-named plaintiff, by his attorney, A. E. Isham, and gives notice at chambers and to the clerk of this court and to all others that he appeals this cause to the supreme court of this Territory by way of writ of error, and requests that this notice be entered of record upon the journal of this court, which is
75 accordingly here now ordered by the court that said notice of appeal be entered of record on said journal, and said appeal is allowed.

Done at chambers, at Olympia, Thurston county, Washington Territory, this the 27th day of July, A. D. 1885.

S. C. WINGARD, *Judge, &c.*

Twenty-sixth Judicial Day.

SATURDAY, *February* 14, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant. } # 3959. Judgment.

This action having been tried on the issue of fact formed herein, and the jury having found the following verdict, to wit:
76 "We, the jury empanelled in the above-entitled case, find that the plaintiff is not entitled to the possession of the property described in the complaint, and that the defendant is the owner in fee simple of said premises and every part thereof.

"NELSON SNODGRASS, *Foreman.*"

Therefore, on motion of B. L. and J. L. Sharpstein, attorneys for defendant, it is considered and adjudged by the court that George Dacres, defendant, is the owner of the premises described in the complaint in this action, to wit:

The N. E. ¼ of the N. W. ¼ and the N. E. ¼ of sec. # 20 and the S. W. ¼ of sec. # 17, T. # 7 north, range # 36 east, in fee simple title, and every part thereof; and it is further considered and adjudged that the defendant recover of the plaintiff the costs and disbursements of this action, taxed at $29.65, and that execution issue therefor.

(Signed) S. C. WINGARD, *Judge, &c.*

77 In the District Court of Washington Territory and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES, Defendant. } Bill of Exceptions and Statement of the Evidence in the Above-Entitled Cause.

Be it remembered that this cause came on for hearing on the 28th day of November, 1884, whereupon the following proceedings were had: A jury was called and empannelled to try the cause.

J. D. Laman, *was* called and sworn as witness for the plaintiff, testified that he was a justice of the peace and real estate agent, and had been for the past six years, in Walla Walla city; that he had some knowledge of the rental value of real estate and houses
78 in the immediate vicinity of the property described in the complaint; that the house and garden would be worth $20.00 per month for the past six years.

D. M. Jessie, sworn as witness for plaintiff, testified that he had some knowledge of the rental value of the property; for the last six years was a gardener, fruit-raiser, and farmer by occupation. The house was worth $15.00 per month, the bottom land, consisting of about 40 or 50 acres, worth $12 to $15 per acre per year.

J. M. McFarland testified he had some knowledge of the rental value of land in that vicinity; way I figure it is from what I have realized on rental land—make it $5.60 per acre. Cross: Make it $5.60 — acre for any other year for wheat land, generally summer fallow every other year.

H. PARKER: Have some knowledge of the rental value of land in that vicinity for wheat purposes. The upland is worth $5.00
79 per acre, cash. I knew Edward Sheil, who made deeds marked 5 and 6.

Cross: Don't know of only one place out there renting for cash. That is the Al. Low place. I determine the cash value from what can be realized from the products of the place. Usual rents are one-third or, in grain, ten bushels per acre.

I knew Edward Sheil, the defendant in the case of Almos H. Reynolds *vs.* Edward Sheil, as a resident of Walla Walla county from 1863 to 1875. I never knew any other Edward Sheil. If there had been any other man of that name in said county I think I would have known him.

Here plaintiff introduced in evidence deeds and patents hereto annexed and made a part of this bill of exceptions, marked Ex. Nos. one (1), two (2), three (3), four (4), five (5), and six (6).

Defendant objected to deeds Nos. five (5) and six (6) on the grounds that they did not prove or tend to prove the title alleged by the plaintiff in his complaint herein; objection overruled; exception allowed.

80 J. B. WILSON testified that he was a surveyor; that there was about 45 acres of the bottom land.

Plaintiff rested.

Whereupon defendant, George Dacres, was called and sworn as a witness for defendant, who testified as follows: I was present on the fourth (4th) day of August, 1874, when the property described in the complaint was sold by the sheriff of Walla Walla county, in the case of Almos H. Reynolds *vs.* Edward Sheil; that said Edward Sheil was present at said sale; that said Sheil made no objections to said sale, and he, at the time of such sale, had a conversation with said Sheil in which said Sheil said he intended to redeem said property from such sale if he could raise the money, and would know in a few days whether he could raise the money or not; that in about one week thereafter said Sheil informed the defendant that he could not raise the money, and then and there delivered
81 the possession of said premises to this defendant, and that ever since said date I has held the same and now holds the same as purchaser at said sheriff's sale.

To all of which evidence the plaintiff excepted at the time, save that portion in regard to the defendant's being in possession of the premises, on the ground that said evidence was immaterial, irrelevant, and incompetent. Objections overruled; ruling excepted to by plaintiff, and exception allowed.

Defendant testified that the land was not worth more than one dollar per acre, including house and garden, since he had been in it; that he had not realized more than that amount clear out of the land; that the rents were not worth any more than the improvements he had put upon the land; that the barn he put on cost $3,000.00; improved the house about $700.00; put 4 or 5 small houses on the place, cost $200.00 or $300.00 each; put a good rail-fence all around the place; rails cost about $9.00 per
82 hundred; broke the most of the place; breaking cost $2.00 per acre.

Here defendant put in evidence transcript of record, hereto annexed and made a part hereof, marked Ex. #8. Plaintiff objected on the grounds that it was immaterial, irrelevant, and incompetent. Objection overruled and exceptions allowed.

Here defendant put in evidence deed, marked Ex. #7, hereto attached and made a part hereof. Plaintiff objected on the grounds that it was made by a sheriff instead of a master in chancery, and without authority in law; objection overruled and exception allowed.

Defendant rested.

Whereupon the court instructed the jury as follows: "Gentlemen of the jury, I instruct you that upon the whole evidence the defendant is entitled to a verdict;" to which instruction the plaintiff then and there excepted, and the exception was allowed.

83 *Patent.*

United States to John Shauble. } Pre-emption Certificate No. 43.

The United States of America to all to whom these presents shall come, Greeting:

Whereas John Shauble, of Walla Walla county, Washington Territory, has deposited in the General Land Office of the United States a certificate of the register of the land office at Vancouver, whereby it appears that full payment has been made by the said John Shauble, according to the provision of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the northwest quarter of the northeast quarter and the north half of the northwest quarter of sec-
84 tion 20, in township seven north, of range thirty-six east, in the district of lands subject to sale at Vancouver, Washington Territory, containing one hundred and twenty acres according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said John Shauble:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said John Shauble and to his heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said John Shauble and to his heirs and assigns forever.

In testimony whereof I, Abraham Lincoln, President of the
85 United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of April, in the year of our Lord one thousand eight hundred and sixty-five, and of the Independence of the United States the eighty-ninth.

[L. S.] By the President:

ABRAHAM LINCOLN.

By EDW. D. NEILL, *Secretary.*

I. N. GRANGER,
Recorder of the General Land Office.

Examined.
Recorded vol. 1, page 22.
Recorded March 17th, 1870.

H. M. CHASE,
Co. Auditor.

86 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, W. C. Painter, county auditor of the above-named county, hereby certify that the foregoing transcript is a true and correct copy of the original, carefully compared by me, as the same now appears of record in my office, on page 113 of Book "G" of Deeds, records of Walla Walla county, W. T.

Witness my hand and official seal this 18th day of November, A. D. 1884.

W. C. PAINTER,
County Auditor.

[Seal of Co. Auditor.]

Ex. 1.
Filed Nov. 25, 1884.

A. REEVES AYRES, *Clerk.*

87 *Patent.*

United States to Philip Shauble.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress approved March 3rd, 1855, entitled "An act in addition to certain acts granting bounty lands to certain officers and soldiers who have been engaged in the military service of the United States," there has been deposited in the General Land Office warrant 108,414, for 160 acres, in favor of Joseph Hancock, teamster, Quartermaster's Department, war with Mexico, with evidence that the same has been duly located upon the southwest quarter of section seventeen, in township seven
88 north, of range thirty-six east, in the district of lands subject to sale at Vancouver, Washington Territory, containing 160 acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, the said warrant having been assigned by the said Joseph Hancock to Philip Shauble, in whose favor said tract has been located:

Now, know ye that there is therefore granted by the United States unto the said Philip Shauble, as assignee as aforesaid, and to his heirs the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Philip Shauble, as assignee as aforesaid, and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purpose, and rights to ditches and reservoirs used in connection with such water rights as
89 may be recognized by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted as provided by law.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the second day of January, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

By the President:

U. S. GRANT,
By S. D. WILLIAMSON, *Secretary.*
L. K. LIPPINCOTT,
[SEAL.] *Recorder of the General Land Office.*

90 Recorded vol. 672, page 19.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, W. C. Painter, county auditor of the above-named county, hereby certify that the foregoing is a true transcript of the original patent filed in my office for record November 17th, 1884, at 1.20 p. m.

Witness my hand and official seal this 17th day of November, A. D. 1884.

[SEAL.] W. C. PAINTER,
County Auditor.

Ex. 2.
Filed Nov. 25th, 1884.

A. REEVES AYRES, *Clerk.*

91 *Deed.*

John Shauble to Edward Sheil.

This indenture, made the seventh day of July, in the year of our Lord one thousand eight hundred *and eighty-seven*, between John Shauble, of the county of Walla Walla, in the Territory of Washington, of the first part, Edward Sheil, of the same place, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of thirty-five hundred ($3,500.00) dollars, gold coin of the United States of America, to him in hand paid, the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part and to his heirs and assigns forever
92 all the *the* certain lot, piece, or parcel of land situate, lying, and being in the county of Walla Walla, Territory of Washington, and bounded and particularly described as follows, to wit:

[I. R. stamp, 3.50, cancelled.]

The north half of the northwest and the northwest quarter of the

northeast quarter of section twenty (20), township seven (7) north, of range thirty-six (36) east, containing one hundred and twenty (120) acres, according to the United States certificate thereof, in the county and Territory as above said—

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders,
93 rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part and his heirs the said premises in the quiet and peaceable possession of the said party of the *said party of the* second part, his heirs and assigns, against the said party of the first part and his heirs and all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said party of the first part has hereunto set his hands and seals the day and year first above written.

94 JOHN SHAUBLE. [SEAL.]

Signed, sealed, and delivered in presence of—
A. H. SIMMONS.
B. L. SHARPSTEIN.

TERRITORY OF WASHINGTON, } 88:
County of Walla Walla, }

Be it remembered that on the seventh day of July, A. D. one thousand eight hundred and seventy, before me, the undersigned authority in and for the said county and Territory, personally appeared John Shauble, whose names *are* subscribed to the foregoing instrument as the party thereto, personally known to me to be the individual described in and who executed the said foregoing instrument, and who has acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

95 In witness whereof I have hereunto set my hand and seal of office the day and year in this certificate first above written.

A. H. SIMMONS, [SEAL.]
Notary Public.

Recorded July 8th 1870.

H. M. CHASE,
Co. Auditor.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, W. C. Painter, county auditor of the above-named county, hereby certify that the foregoing transcript is a true and correct copy of the original, carefully compared by me, as the same now appears of record in my office, on page 317 of Book "G" of Deeds, records of Walla Walla county, W. T.

Witness my hand and official seal this 18th day of November, A. D. 1884.

96 W. C. PAINTER,
County Auditor.

[Seal of County Auditor.]

Ex. 3.
Filed Nov. 25, 1884.

A. REEVES AYRES, *Clerk.*

Deed.

Philip Shauble to Edward Sheil.

This indenture, made the 8th day of August, in the year of our Lord one thousand eight hundred and seventy, between Philip Shauble for himself and as guardian of his wife Wilheminie Shauble, now insane, by authority of letters of guardianship issued by the probate court in and for said county of Walla Walla, the parties of the first part, and Edward Sheil, all of Walla Walla county,
97 the party of the second part—

Witnesseth: That the said parties of the first part, for and in consideration of the sum of fifteen hundred dollars, coin of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part and to his heirs and assigns forever all that certain lot, piece, or parcel of land situate, lying, and being in the county of Walla Walla, Territory of Washington, and bounded and particularly described as follows, to wit:

The southwest quarter of the northwest quarter and the northwest of the southwest quarter of section twenty (20), township seven (7) north, of range thirty-six (36) east, excepting, reserving
98 therefrom all lots or pieces heretofore sold and conveyed by the said parties of the first part or either of them; also the southwest quarter of section seventeen (17), township seven (7) north, of range thirty-six (36) east, of the Willamette meridian, in the (L. R. stamp, 1.50 cancelled) district of lands subject to sale at the land office at Vancouver, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, re-

mainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances: to have and to hold all and singular the said premises, together with
99 the appurtenance unto the said parties of the second part, their heirs and assigns, forever; and the said parties of the first part and their heirs the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

PHILIP SHAUBLE, [SEAL.]
WILHELMENA SHAUBLE, [SEAL.]
By PHILIP SHAUBLE, *Guardian.*

Signed, sealed, and delivered in presence of—
A. H. SIMMONS.
B. L. SHARPSTEIN.

100 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

Be it remembered that on this 8th day of August, A. D. one thousand eight hundred and seventy, before me, the undersigned authority in and for the said county and Territory, personally appeared Philip Shauble, whose name is subscribed to the foregoing instrument as the party thereto, personally known to me to be the individual described in and who executed the said foregoing instrument, and who has acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

And I further certify that the records of said probate court show the appointment of said Philip Shauble as guardian on the first day of November, A. D. 1865, of the said Wilhelmena Shauble, wife of the said Philip Shauble.

In witness whereof I have hereunto set my hand and seal
101 of office the day and year in this certificate first above written.

A. H. SIMMONS, [L. S.]
Notary Public.

Recorded August 10th, 1870.

H. M. CHASE,
Co. Auditor.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, W. C. Painter, county auditor of the above-named county, hereby certify that the foregoing transcript is a true and correct copy of the original, carefully compared by me, as the same now appears of record in my office, on page 367 of Book "G" of Deeds, records of Walla Walla county, W. T.

Witness my hand and official seal this 17th day of November, A. D. 1884.

[Seal of County Auditor.]

Ex. 4.

W. C. PAINTER,
Co. Auditor.

102 Filed Nov. 25, 1884.

A. REEVES AYRES, *Clerk.*

Deed.

Edward Sheil to H. Parker.

This indenture, made the twenty-ninth day of April, A. D. eighteen hundred and seventy-six, between Edward Sheil, formerly of Walla Walla county, Washington Territory, the party of the first part, and H. Parker, of Walla Walla county, Territory of Washington, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of five dollars to him in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, confirmed,
and quitclaimed unto the said party of the second part and
103 to his heirs and assigns forever all the right, title, and interest of the said party of the first part in and to all those certain lots, pieces, or parcels of land situate, lying, and being in the county of Walla Walla, Territory of Washington, to wit, the property described in the deed — trust from the said party of the first part to the said party of the second part, dated on or about the 1st day of October, 1874, and recorded on page 614, Book "L," of *of* Deeds of Walla Walla county records, in said Territory of Washington, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise —, and homestead right and dower; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part hath
104 hereunto set his hand and seal the day and year first above written.

EDWARD SHEIL. [SEAL.]

Signed, sealed, and delivered in presence of—
GEO. H. JONES.
JAMES WALTON.

STATE OF OREGON, } ss:
County of Marion, }

Be it remembered that this 29th day of April, A. D. one thousand eight hundred and seventy-six, before me, a commissioner for Washington Territory in and for said county and State, personally appeared Edward Sheil, whose name is subscribed to the foregoing instrument as 1st party thereto, personally known to me to be the individual described in and who executed the said foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

105 In witness whereof I have hereunto set my hand and official seal the day and year in this certificate first above written.

GEO. H. JONES,
A Commissioner of Deeds for Washington Territory.

[L. S.]

Recorded October 19th, 1876.

R. JACOBS,
County Auditor.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, W. C. Painter, county auditor of the above-named county, hereby certify that the foregoing transcript is a true and correct copy of the original, carefully compared by me, as the same appears of record in my office, of page 466 of Book "N" of Deeds, records of Walla Walla county, W. T.

Witness my hand and official seal this 19th day of November, 1884.

106 W. C. PAINTER, [SEAL.]
County Auditor.

Filed Nov'r 25th, 1884.

A. REEVES AYRES, *Clerk.*

Ex. 5.

Deed.

Edward Sheil to H. Parker, trustee.

This indenture, made the first day of October, A. D. eighteen hundred and seventy-four, between Edward Sheil, of Walla Walla county, Territory of Washington, the party of the first part, and H. Parker, of the same place, trustee, for the uses and purposes hereinafter recited, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of five dollars, lawful money of the United States, to
107 him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell,

alien, release, convey, and confirm, to the said party of the second part, to his heirs and assigns, forever the following-described tracts or parcels of real estate situate, lying, and being in the county of Walla Walla, Territory of Washington, and more particularly described as follows, to wit: The northwest ¼ of northeast ¼, northeast ¼ of northwest ¼ and lot 1, sec. 32, t'p 7, R. 34, 101 $\frac{26}{100}$ acres, and E. ½ of N. E. ¼ and S. W. ¼ of N. E. ¼, sec. 22, and W. ½ of N. W. ¼, sec. 23, T. 7, R. 36, 200 acres, and N. ½ of S. E. ¼, N. E. ¼ of S. W. ¼ and lot 4, sec. 35, T. 8, R. 35, 134 $\frac{30}{100}$ acres, and S. E. ¼ of sec. 17, T. 7, R. 36, 159 acres, except one acre in S. E. corner deeded to Walla Walla city for hospital, and W. ½ of S. E. ¼ and S. ½ of S. W. ¼, sec. 27, T. 7, range 35, 160 acres, and S. W. ¼ of S. E. ¼ and S. ½ of S. W. ¼, sec. 30,
108 and N. ½ of N. E. ¼ and N. ½ of N. W. ¼ of sec. 31, T. 8, R. 36, 287 $\frac{13}{100}$ acres, and N. W. ¼ of N. E. ¼ and E. ½ of N. W. ¼ and N. W. ¼ of S. W. ¼, sec. 12, T. 7, R. 35, 160 acres, and N. W. ¼ of S. E. ¼, sec. 23, T. 8, R. 36, 40 acres, all the foregoing-described land being patented from the United States to the party of the first part; and S. W. ¼ of sec. 17, T. 7, R. 36, the same being described in deed from Philip Shauble to the party of the first part, dated August 8th, 1870, and recorded in Walla Walla county records August 10th, 1870, in Record of Deeds, Book "G," page 367; also all that portion described in said deed as the S. W. ¼ of N. W. ¼ and N. W. ¼ of S. W. ¼ of the same sec., township, and range, excepting and reserving therefrom all lots and pieces excepted in said deed; also those pieces and parcels heretofore deeded by the said party of the first part, and N. ½ of N. W. ¼, N. W. ¼ of N. E. ¼, sec. 20, T. 7, R. 36, the same being described in the deed from John Shauble to the party of the first part, dated July 7, 1870, recorded in
109 Walla county records of deeds July 8, 1870, in Book G, page 317, the same description containing Sheil's second addition to Walla Walla city, except all lots, pieces, and parcels of land heretofore deeded by the party of the first part, and lots 1, 2, 9, and 10, in block 53, and lots 1, 2, 3, 4, and 5, in block 52, and lots 3 and 4, in block 5, and lots 1 and 9, in block 4, and lots 9 and 10, in block 3, and all of block H, and lots 1, 2, 3, 4, 5, 6, 7, 9, and 10, in block 2, and lots 9, 10, 11, 12, 13, 14, 15, 16, and 17, in block I, and lots, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, in block 8. All the above town lots are in what is known as Shauble's addition to Walla Walla city, and included in the above description as referred to in the above description as referred to in the above Philip Shauble deed.

All of lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in block 2, with lots 1 and 2, in block 8, may have been deeded to W. B. Thomas, but bonded back by said Thomas to the party of the first
110 part; also all of block- P, N, and J and lots 1, 2, 3, 4, 5, and 6, in block K, the same being in what is known as Shiel's addition to the city of Walla Walla, and also included in the description of the aforesaid Phillip Shauble deed; and all of blocks 2, 3, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, and 18, M, R, S, T, U, V, W, and lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38, in block

Q, in Shiel's second addition to Walla Walla city, and included in the above description of the land described in the aforesaid John Shauble deed to the party of the first part; and lot No. 5, in block No. 5, in the city of Walla Walla, as per deed from J. H. Moors and wife to the party of the first part, dated April 28th, 1870, and recorded in records of Walla Walla county, in Book G of Deeds, page 243; also lot 6, in block 5, of the city of Walla —, as per deed of said city to the party of the first part, recorded in Book G of Deeds, page 34; also all, part, or portion of lots 4, in block 12, commencing at a point on the south side of Main street, distance 95 feet eight inches from N. W. corner of block 12, at the N. E. corner of the land purchased from J. D. Agnew by O. Brechtel, and fronting thence easterly
111 along the south side of Main street twenty-five feet and one inch and extending back one hundred and twenty feet to the alley in block 12; also lot 7, in block 5, and W. ½ of lot No. 8, in said block 5, fronting 90 feet on the west side of Main street and extending back one hundred and twenty feet to the alley in said block, as per deed of the city of Walla Walla to the said party of the first part; and also any and all other real estate *estate* owned or belonging to the party of the first part—that is, in Walla Walla county, Territory of Washington—together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, homestead, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises and every part and parcel thereof, with the appurtenances; to have and to hold the above-described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns
112 *assigns*, forever; but this conveyance of the aforesaid property to the party of the second part is in trust for the uses and purposes hereinafter recited and referred to.

Whereas Edward Shiel, the party of the first part, is the rightful redem-tioner of such of the aforesaid real estate as has been sold under mortgage and judgments and execution; and whereas other portions of the aforesaid real estate are under mortgage; and whereas said party is owing, in addition to the above, in gold coin, $40.50 to Martin Campbell; $53, note, W. S. Byers; $111, note to Wm. O'Donnell; $50 to Dusenbery Brothers; $100 to Stein; about $130 to Baker and Boyer, and several small amounts to various persons:

The said H. Parker, party of the second part, his heirs and assigns, is and are to proceed to sell, convey, dispose of as speedily as possible the aforesaid property, and — the proceeds thereof to pay to the party of the first part five hundred dollars, gold coin, if no objection be made to him in writing by any of the creditors
113 before paying the same, and pay off such of those who bid in land at the aforesaid sales as may seem meet to him, and have the property so redeemed in his name in trust and sell the same for the purposes hereof, and pay off the claims of the aforesaid cred-

bid as aforesaid, the receipt whereof is hereby acknowledged, has bargained, sold, assigned, conveyed, and confirmed, and by
119 these presents does grant, bargain, sell, assign, and convey and confirm, unto the said party of the second part and to his heirs and assigns forever the following-described real estate, described in said order of sale as follows, to wit:

The N. E. ¼ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ of section No. 20 (N. E. ¼ of N. W. ¼ and N. W. ¼ of N. E. ¼ of section No. 20), and the southwest quarter of section No. 17, township 7 north, of range 36 east, situated in the county of Walla Walla aforesaid, with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining; to have and to hold the same to the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

B. W. GRIFFIN. [SEAL.]
Late Sheriff of Walla Walla Co.

Signed, sealed, and delivered in presence of—
SILAS J. DAY.
E. D. FONDRAY.

STATE OF OREGON, } ss:
County of Jackson, }

120 On this 17th of July, A. D. one thousand eight hundred and seventy-six, personally appeared before me, E. D. Fondray, county clerk and *ex officio* clerk of the county court in and for the said county of Jackson, B. W. Griffin, late sheriff of Walla Walla county, W. T., whose name is subscribed to the annexed instrument as the party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as the party thereto, who duly ackno-ledged to me that he executed the same as such late sheriff freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of said court the day and year in this certificate first above written.

[SEAL.] E. D. FONDRAY,
County Clerk.

WASHINGTON TERRITORY, } ss:
Walla Walla County, }

I hereby certify that the foregoing deed has been presented
121 to me and has been duly entered of record in the book of levies in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the district court this 18th day of June, 1884.

[SEAL.]
A. REEVES AYRES,
Clerk District Court.

Filed June 19th, 1884, at 9.30 a. m.
Recorded at request of B. L. Sharpstein.

W. C. PAINTER, *Auditor.*

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, W. C. Painter, county auditor of the above-named county, hereby certify that the foregoing transcript is a true and correct copy of the original, carefully compared by me, as the same now appears of record in my office, on page 53 of Book 33 of Deeds, records of Walla Walla county, W. T.

Witness my hand and official seal this the 6th day of November, A. D. 1884.

[SEAL.]

W. C. PAINTER,
County Auditor.

Ex. 7.
Filed Nov. 25th, 1884.

A. REEVES AYRES, *Clerk.*

122 *Transcript. A. H. Reynolds vs. E. Shiel.*

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

In the District Court, First Judicial District.

ALMAS H. REYNOLDS, Plaintiff, }
vs. } In Equity.
EDWARD SHIEL, Defendant. }

To Wm. H. Andrews, Esq., clerk of said court.

SIR: You will please issue a subpœna in the above-entitled suit, which is brought to foreclose a mortgage against the above-named defendant, and make the same returnable on the first Monday of August, 1873.

Yours, &c.,

B. L. SHARPSTEIN,
Solicitor for Complainant.

Endorsed: Precipe. Filed July 9th, 1873. Wm. H. Andrews, clerk.

123 *Subpœna in Chancery.*

TERRITORY OF WASHINGTON, *County of Walla Walla:*

In the District Court of the First Judicial District of Washington Territory.

ALMAS H. REYNOLDS, Plaintiff, *vs.* EDWARD SHIEL, Defendant.

The United States of America to Edward Shiel, Greeting:

We command you that you personally appear before our judge of the first judicial district of the Territory of Washington, in our court

of chancery, on the first Monday in August, A. D. 1873, wheresoever the said court shall then be, to answer to a bill of complaint exhibited against you in our said court by Almas H. Reynolds, complainant, and to do and to receive what our said court shall consider in that behalf, and this you are not to omit, under the penalty of five hundred dollars.

124 Witness the Hon. Joseph R. Lewis, judge of the district court of the first judicial district of Washington Territory, with the seal of said court affixed, at Walla Walla city and county, Washington Territory, this 9th day of July, A. D. 1873.

[SEAL.] WM. H. ANDREWS,
Clerk & Register.

The defendant is required to enter his appearance in the above cause in the clerk's office of this court on or before the first Monday in August, A. D. 1873, or the bill may be taken *pro confesso*.

WM. H. ANDREWS,
Clerk and Register.

B. L. SHARPSTEIN,
Solicitor for Complainant.

Endorsed.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I hereby certify that I have served the within subpœna and bill in equity on Edward Sheil by delivering to him personally a certified copy hereof in said county and Territory on the 9th day of July, A. D. 1873.

Certified to by Wm. H. Andrews, clerk, to be a true copy.

B. W. GRIFFIN, *Sheriff,*
By F. KIMMERLY, *Deputy.*

Fees, $5.00.

125 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

In the District Court, First Judicial District.

ALMAS H. REYNOLDS, Plaintiff,
vs.
EDWARD SHIEL, Defendant. } Bill to Foreclose Mortgage.

To the Hon. J. R. Lewis, judge of the district court of the first judicial district of Washington Territory:

Almas H. Reynolds, a resident of Walla Walla county, in the Territory of Washington, and a citizen of said Territory, brings this his bill of complaint against Edw. Shiel, a resident of Walla Walla county and a citizen of Washington Territory, and thereupon your orator says—

That on the 7th day of July, 1870, the defendant, Edward Sheil,

made his promissory note in writing in the words and figures following, to wit:

126 $1,000. WALLA WALLA, *July 7th*, 1870.

On the second day of April next I promise to pay John Shauble or order the sum of one thousand dollars in U. S. gold coin, with interest at the rate of one per cent. per month, for value received.

EDW. SHEIL.

And the defendant then and there delivered the said note to one John Shauble, and on the said 7th day of July, 1870, the said defendant made his certain other promissory note in writing in the words and figures following to wit:

$1,000. WALLA WALLA, *July 7th*, 1870.

On or before the 7th day of July, 1872, I promise to pay John Shauble or order the sum of one thousand dollars in U. S. gold coin, with interest at the rate of one per cent. per month, interest payable annually, for value received.

EDW. SHIEL.

127 And the defendant then and there delivered the said last-mentioned note to the said John Shauble, and on the said 7th day of July, 1870, the said defendant made his other certain promissory note in writing in the words and figures following, to wit:

$1,064. WALLA WALLA, *July 7th*, 1870.

On or before the 7th day of July, 1873, I promise to pay to John Shauble or order the sum of one thousand and sixty-four dollars in U. S. gold coin, with interest at the rate of one per cent. per month, interest payable annually, for value received.

EDW. SHIEL.

And then and there delivered the same to the said John Shauble; and thereupon the said defendant duly made, executed, and delivered to the said John Shauble his mortgage, dated on the 8th day of August, 1870, by which said mortgage the said Edward Shiel, defendant, bargained and sold to the said John Shauble, his heirs

128 and assigns, all the following-described premises situate, lying, and being in the county of Walla Walla and Territory of Washington, and particularly described as follows, to wit:

"The northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section No. twenty (20) and the southwest quarter of section No. seventeen (17), all in township No. 7 (seven) north, of range number thirty-six (36) east, of the Willamette meridian, containing two hundred and forty acres," together with all the hereditaments and appurtenances thereunto belonging; which conveyance was, nevertheless, upon the condition

that the same should be void if the sum of money mentioned in the said promissory notes should be "made" according to the conditions of said notes, but in case default should be made in the payments of said principle sums and interest or any part thereof, then the said John Shauble, his heirs or assigns, was empowered and authorized by said mortgage to sell the said mortgaged premises in the manner prescribed by law, and out of the money
129 arising from such sale to retain the principal and interest due on the said notes, together with the costs and charges of such sale and five per cent. on the whole amount found due on said notes as solicitor's fees in the foreclosure suit on said mortgage, which said mortgage was duly ackno-ledged, and on the 9th day of August, A. D. 1870, was duly recorded in the office of the county auditor of Walla Walla county, in Book "B" of Mortgages, on page 451.

Your orator further shows that on the 28th day of March, 1872, the said John Shauble, by an instrument in writing under his hand and seal, duly assigned said notes and mortgage to your orator for value, and then and there endorsed and delivered the said notes to your orator, and that your orator is now the owner and holder of the said notes and mortgage.

And your orator further shows that no payments have been
130 made on the said notes and mortgage or either of them except the sum of nine hundred dollars paid and endorsed on said first-mentioned note on the 6th day of April, 1872, and the sum of eighty-two dollars and sixty-nine cents paid and endorsed on said first-described note on the 27th day of July, 1872, and that there is now due your orator on the said notes & mortgage the sum of three thousand one hundred and sixty-four and forty-four one-hundredths dollars in gold coin; and your orator further shows that no proceedings have been had, at law or otherwise, for the recovery of said money or any part thereof.

Wherefore your orator prays that an account be taken of what is due your orator on the said notes and mortgage, and that the defendant be decreed to pay to your orator what shall be found due him by a short day to be named by this hon. court, together with your orator's costs and disbursements in this suit and the five per cent. on the whole amount found due on the said notes as solicitor's fees in this suit, as stipulated in said mortgage, and that in
131 default of such payment the defendant and all persons claiming under him subsequent to the commencement of this suit be foreclosed of all equity of redemption or other interests in said mortgaged premises, and that the same be sold, and the proceeds of such sale be applied to the payment of the costs and expenses of this suit and the amount found due your orator on said notes and mortgage, both principal and interest, up to the time of such sale and the payment of the five per cent. on the whole amount found due on said notes as solicitors' fees in this suit, and that if the proceeds of such sale be insufficient to pay the same the defendant, Edward Shiel, be adjudged to pay any deficiency that may remain after applying all the moneys properly applicable thereto, and that your orator may have such other and further relief in the premises as

equity and good conscience may pertain; and may it please your honor to grant unto your orator a writ of subpœna, to be issued out of and under the seal of this court, directed to the said Edward Shiel, defendant, commanding him, on a certain day therein
132 to be named and under a certain penalty, to be and appear in this hon. court, then and there to answer all and singular — premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against him.

B. L. SHARPSTEIN,
Solicitor for Complainant.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

Almas H. Reynolds, being first duly sworn, deposes and says that he is the complainant in the foregoing bill in equity; that he has heard the same read and knows the contents thereof and believes it to be true.

A. H. REYNOLDS.

Subscribed and sworn to before me this 9th day of July, A. D. 1873.

W. H. ANDREWS, *Clerk.*

Endorsed: Bill in equity. Filed July 9th, 1873. W. H. Andrews, clerk.

Served July 10th, 1873.
Sheriff's fees, $5.00.

133 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

In the District Court, First Judicial District.

ALMAS H. REYNOLDS, Plaintiff,
vs.
EDWARD SHIEL, Defendant. } In Chancery.

The subpœna issued in the above-entitled suit having been returned and said return filed herein, and it appearing therefrom that said subpœna, together with the bill in this suit, was duly served on Edward Shiel, defendant, on the 9th day of July, A. D. 1873, by delivering to him personally, in the said county of Walla Walla, true copies of said subpœna and bill certified by the clerk of this court to be such copies, and no appearance having been entered by defendant in person or by solicitor, and no plea, answer, or demurrer having been filed herein, therefore, on motion of B. L. Sharpstein, solicitor for complainant, it is ordered and decreed
134 that the bill herein be taken *pro confesso* as to said defendant, Edward Shiel.

J. R. LEWIS, *Judge.*

September 1st, 1873.

Endorsed: Order to take bill *pro confesso*. Filed Sept. 1st, 1873. Wm. H. Andrews, clerk.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

In the District Court, First Judicial District.

ALMAS H. REYNOLDS, Plaintiff, }
vs. } In Chancery.
EDWARD SHEIL, Defendant. }

The subpœna and bill of complaint in the above-entitled suit having been personally served on the defendant above named, and no appearance having been entered by defendant, and no
135 plea, answer, or demurrer having been filed herein, and the bill having been taken *pro confesso* against defendant, on motion of B. L. Sharpstein, Esq., solicitor for complainant, it is ordered that this cause be referred to W. A. George, Esq., master in chancery of this court, to take an account of what is due and owing to complainant for principal and interest on the note and mortgage described in complainant's bill in this suit and report the same with all convenient despatch to this court.

September 1st, 1873.

J. R. LEWIS, *Judge.*

Endorsed: Order of reference. Filed Sept. 1st, 1873. Wm. H. Andrews, clerk.

136 In the District Court of the First Judicial District of Washington Territory.

A. H. REYNOLDS }
vs. } In Chancery.
EDWARD SHEIL. }

This cause having been by the court referred to W. A. George, master in chancery of said court, "to take an account of what is due and owing to complainant for principal and interest on the note and mortgage described in complainant's bill in this suit and report the same with all convenient dispatch to this court," and the said master, having taken said account as by said order directed, would respectfully report the same to the court as follows:

That the —— is due and owing to the said complainant on said notes and mortgage the sum of two thousand two hundred and seventy-nine and fifty-seven one-hundredths dollars in gold coin,
137 as principal, and eight hundred and fifty-seven and fifty-nine one-hundredths dollars in like coin, interest up to September 1st, 1873, making in principal and interest the sum of three thousand one hundred and thirty-seven and sixteen one-hundredth-dollars in gold coin, and the further sum of one hundred and eighty-

six and eighty-five one-hundreth- dollars as solicitor's fees in this suit.

Respectfully submitted, W. A. GEORGE,
Master in Chancery.

Master's fees, $10.

Endorsed: Report of the master of the amount due complainant. Filed Sep. 4th, 1873. Wm. H. Andrews, clerk.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

Be it remembered that at a regular term, to wit, the regular September term, A. D. 1873, of the district court of Washington Territory, and for the first judicial district thereof, holding terms at Walla Walla, Walla Walla county, in said Territory, begun
138 and held, at the city of Walla Walla, on Monday, the 22nd day of September, A. D. 1873, Hon. J. R. Lewis, sole judge, presiding, among other the following proceedings were had, to wit:

Tenth Judicial Day, October 2nd, 1873.

ALMAS H. REYNOLDS, Plaintiff, }
vs. } Decree.
EDWARD SHEIL, Defendant. }

B. L. Sharpstein, solicitor for plaintiff.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it is ordered and adjudged and decreed that the defendant, Edward Sheil, within sixty days from this date, pay into this court the sum of three thousand one hundred and thirty-seven and sixteen one-hundredth- dollars in gold coin, and interest thereon at the rate of ten per
139 cent. per annum in like coin from the first day of September, 1873, and the further sum of one hundred and eighty-six and eighty-five one-hundredth- dollars as solicitor's fees in this suit, and the costs and disbursements of this suit, taxed at thirty and twenty one-hundredth- dollars, and, in default of such payments, that the sheriff of Walla Walla county, Washington Territory, for the time being, who is hereby appointed special master for that purpose, proceed to sell the mortgaged premises, or so much thereof as may be necessary, for gold coin, which premises are situated in Walla Walla county, Territory of Washington, and particularly described as follows, to wit:

The northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section No. twenty (20) and the southwest quarter of section No. 17, all in township No. seven north, of range No. thirty-six east, together with all and singular the
140 tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; that the same, or as much thereof as may be necessary, be advertised and sold by said master as upon execution according to the laws of Washington Ter-

ritory; that the said master pay from the proceeds of said sale, after deducting therefrom all accruing costs and the expenses of said sale, to the complainant what may be due him as above, and should there be a surplus after said payments that he pay it over to Edward Sheil.

That the complainant or any of the parties hereto may become purchasers at said sale.

That the master execute and deliver to the purchaser or purchasers at said sale good and sufficient deed or deeds in fee simple to the premises sold, and forthwith make return of all his doings herein to this court; that the defendant, Edward Shiel, pay
141 to the complainant the balance, if any, that may be due him over and above the proceeds of said sale, and that execution issue therefor according to law; that from and after said sale the defendant, Edward Sheil, shall and do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the aforesaid mortgaged premises, or so much thereof as may be sold at said sale.

And it is further ordered, adjudged, and decreed that said defendant, who may be in possession of said premises, or any person or persons who has or who have come in under him or either of them pending this suit, deliver up the possession of said premises to said purchaser or purchasers at said sale on demand made therefor by said purchaser or purchasers and the production of the master's deed ordered to be made.

And it is further ordered, adjudged, and decreed that a
142 copy of this decree, certified to by the register in chancery of this court, be sufficient process herein.

J. R. LEWIS, *Judge.*

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

In the District Court, First Judicial District.

ALMAS H. REYNOLDS, Plaintiff,

vs.

EDWARD SHEIL, Defendant.

Clerk's fees	$15 20
Sheriff's fees	5 00
Master's fees	10 00
	$30 00

B. L. Sharpstein, being first duly sworn, deposes and says that he is the attorney for the complainant in the above-entitled
143 suit; that the foregoing cost bill is correct and true and was necessarily incurred in said suit.

B. L. SHARPSTEIN.

Subscribed and sworn to before me this 4th day of October, 1873.
WM. H. ANDREWS, *Clerk.*

Endorsed: Cost bill. Filed Oct. 4th, 1873. Wm. H. Andrews, clerk.

In the District Court, First Judicial District, Holding Terms at Walla Walla City for the Counties of Walla Walla and Whitman, Washington Territory. September Term, 1873. 10th Judicial Day, October 2nd, 1873.

ALMAS H. REYNOLDS, Plaintiff,
vs.
EDWARD SHEIL, Defendant. } Decree.

B. L. Sharpstein, solicitor for plaintiff.

144 This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is ordered and adjudged and decreed that the defendant, Edward Sheil, within sixty days from this date, pay into this court the sum of three thousand one hundred and thirty-seven and sixteen one-hundredth-dollars, in gold coin, and interest thereon at the rate of ten per cent. per annum, in like coin, from the first day of September, 1873; and the further sum of one hundred and eighty-six and eighty-five one-hundredth- dollars as solicitors' fees in this suit, and the costs and disbursements of this suit, taxed at thirty and twenty one-hundredth-dollars; and in default of such payments that the sheriff of Walla Walla county, Washington Territory, for the time being, who is hereby appointed special master for that purpose, proceed to sell the mortgaged premises or so much thereof as may be necessary,
145 for gold coin, which premises are situated in Walla Walla county, Territory of Washington, and are particularly described as follows, to wit: The northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section No. 20 (twenty) and the southwest quarter of section No. 17 (seventeen), all in township No. seven (7) north, of range 36 east, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; that the same or as much thereof as may be necessary be advertised and sold by said master as upon execution, according to the laws of Washington Territory; that the said master pay from the proceeds of said sale, after deducting therefrom all accruing costs and the expenses of said sale, to the complainant what may be due him as above; and should there be a surplus after said payment that he pay it over to Edward Sheil; that the complainant or any of the
146 parties hereto may become purchasers at said sale; that the master execute and deliver to the purchaser or purchasers at said sale good and sufficient deed or deeds, in fee simple, to the premises sold, and for him to make return of all his doings herein to this court; that the defendant, Edward Sheil, pay to the complainant the balance, if any, that may be due him over and above the proceeds of said sale, and that execution issue therefor according to law;

that from and after said sale the defendant, Edward Sheil, shall and do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the aforesaid mortgaged premises or so much thereof as may be sold at said sale.

And it is further ordered, adjudged, and decreed that said defendant, who may be in possession of said premises or any person or persons who has or have come in under him or either of them pending this suit, deliver up the possession of said premises to said purchaser or purchasers at said sale on demand therefor by said purchaser or purchasers and the production of the master's
147 deed ordered to be made; and it is further ordered, adjudged, and decreed that a copy of this decree, certified to by the register in chancery of this court, be sufficient process herein.

J. R. LEWIS, *Judge.*

October 2, 1873.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Wm. H. Andrews, clerk and register in chancery for the district court, first judicial district, of said county and Territory, hereby certify that the foregoing is a true and correct copy of the decree in the foregoing entitled cause, as now appears of record on page 589, in Book "D" of records now in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this the 12th day of February, 1874.

[SEAL.] WM. H. ANDREWS,
Clerk and Register.

The within order of sale is hereby returned by direction of
148 B. L. Sharpstein, attorney for plaintiff.

Dated this the 12th day of May, 1874.

B. W. GRIFFIN.

Endorsed: Chancery. Almas H. Reynolds *vs.* Edward Sheil. Order of sale.

		Am't coin	$3,137 16
Oct. 2, 1873.		Solicitors' fee	186 88
Cr. by coin	$500 00	Clerks'	15 20
		Master	10 00
Sheriff's fees	16 10	Sheriff	5 00
Printers' bill	12 00	Interest	
		Order of sale	3 50

Returned and filed May 12th, 1874. Wm. H. Andrews, clerk.

Walla Walla Union newspaper. Job printing establishment. Attention given to the execution of ornamental job printing.

WALLA WALLA, W. T., *Aug.* 4, 1874.

Mr. B. W. Griffin, sheriff, to R. M. Smith and Co., Dr.

L. T.

For publishing annexed notice required time $10 00
Rec'd paym't. R. M. SMITH AND CO.

149 *Sheriff's Sale of Real Estate.*

Pursuance to a decree of foreclosure and order of sale issued out of the district court of the first judicial district of Washington Territory, holding terms at Walla Walla city for the counties of Walla Walla and Whitman, in a certain cause therein pending, wherein Almas H. Reynolds was plaintiff and Edward Sheil, defendant, judgment was rendered in said action on the 2nd day of October, 1873, in favor of said plaintiff and against said defendant for the sum of $3,137.16, gold coin, with interest thereon at the rate of ten per cent. per annum, with $186.85, attorneys' fees, and costs of said action:

Now, therefore, by virtue of said decree, a certified copy of which has been duly issued out of and under seal of said court and to me delivered, I will, on Tuesday, the 4th day of August, 1874, at the court-house door, in the city and county of Walla Walla, at the hour of one o'clock p. m., sell to the highest and best bidder, for
150 gold coin, the mortgaged premises in said decree mentioned and described as follows, to wit: The N. E. ¼ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ of section No. 20 and the S. W. ¼ of section No. 17, T. No. 7 north, R. No. 36 east, with all and singular the tenements, hereditaments, appurtenances, and privileges thereunto belonging, or so much thereof as may be necessary to satisfy said judgment, with interest, attorneys' fees, and all costs.

Given under my hand this July 4th, 1874.

B. W. GRIFFIN,
Sheriff of Walla Walla County,
By F. KIMMERLY, *Deputy.*

B. L. SHARPSTEIN,
Attorney for Plaintiff.

I hereby certify that the annexed order of sale came into my hands on the 29th day of June, 1874.

That on the 4th day of July, 1874, I did advertise the premises in said decree or order of sale mentioned and described as follows, to wit: The N. E. ¼ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ of section No. 20 and the S. W. ¼ of section No. 17, township
151 No. 7 north, of range 36 east. Said premises were advertised for sale by posting printed notices of sale in three of the most public places in my county, to wit, in Walla Walla, Waitsburg, and Dayton, for four consecutive weeks prior to and immediately before the day of sale, a true copy of which said notices is hereto annexed and for reference is made a part of this return.

I also caused to be published a copy of said notices in the Walla Walla Union, a newspaper of general circulation in my county, for four consecutive weeks prior to and immediately before the day set in said notices as the day of sale.

Now, in conformity with the time set in said notices as the day of sale, to wit, August 4th, 1874, at one o'clock p. m., I was at the court-house door in the city and county of Walla Walla, and then and

there made sale of the above-described real property in manner and form as follows, to wit: I proclaimed aloud, in the hearing of
152 the bystanders: I am now about to sell the following-described real estate. Here I read a description of the premises. I then read the decree or order of sale and then the notice of sale, stating the amount to be raised in coin. I then offered the above-described land by the acre, deeming it best to sell all together, knowing that a portion was very poor and a portion lying more convenient and favorable. Accordingly I offered it as a whole by the acre, when George Dacres, who was present, bid $12.50 per acre. That being the highest and best offer made at said sale for the above-described real estate, I struck off "to him," "Dacres," the N. E. ¼ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ of section 20 and the S. W. ¼ of section 17, township 7 north, of range 36 east, lying and being in the county of Walla Walla and Territory of Washington, for the sum of $12.50, coin, per acre; that the whole sum realized at this sale was $3,000, gold coin, which said sum was forthwith paid to me by said George Dacres; whereupon I made and delivered to him, George Dacres, a certificate of sale as directed by
153 law. Out of the proceeds of said sale I paid all the costs and expenses of sale, including sheriff's costs, clerk's costs, attorneys' fees, and printers' bill, amounting to the sum of $245.94, coin. I then paid in to the clerk of this court $2,397.30 *dollars*, coin, the full amount of judgment and interest, leaving a balance in my hands of $356.76, gold coin.

I therefore return the annexed order of sale fully satisfied.

B. W. GRIFFIN, *Sheriff*,
By F. KIMMERLY, *Deputy*.

Walla Walla, W. T., August 5th, 1874.

154 In the District Court, First Judicial District, Holding Terms at Walla Walla City for the Counties of Walla Walla and Whitman, Washington Territory. September Term, 1873.

Tenth Judicial Day, October 2nd, 1873.

ALMAS H. REYNOLDS, Plaintiff,
vs.
EDWARD SHEIL, Defendant. } Decree.

B. L. Sharpstein, solicitor for plaintiff.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the defendant, Edward Sheil, within sixty days from this date, pay into this court the sum of three thousand one hundred and thirty-seven and sixteen one-hundredth- dollars, in gold coin, and interest thereon, at the rate of ten per
155 cent. per annum, in like coin, from the first day of September, 1873, and the further sum of one hundred and eighty-six and eighty-five one-hundredth- dollars, as solicitors' fees in this suit, and

the costs and disbursements of this suit, taxed at thirty and twenty one-hundredth- dollars; and, in default of such payments, that the sheriff of Walla Walla county, Washington Territory, for the time being, who is hereby appointed special master for that purpose, proceed to sell the mortgaged premises, or so much thereof as may be necessary, for gold coin; which premises are situated in Walla Walla county, Territory of Washington, and particularly described as follows, to wit:

The northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section No. twenty (20) and the southwest quarter of section No. 17 (seventeen), all in township No. seven (7) north, of range No. thirty-six (36) east, together with all and singular the tenements, hereditaments, and appurte-
156 nances thereunto belonging or in anywise appertaining; that the same, or as much thereof as may be necessary, be advertised and sold by said master as upon execution, according to the laws of Washington Territory; that the said master pay from the proceeds of said sale, after deducting therefrom all accruing costs and the expenses of said sale, to the complainant what may be due him as above, and should there be a surplus after said payments that he pay it over to Edward Sheil; that the complainant or any of the parties hereto may become purchasers at said sale; that the master execute and deliver to the purchaser or purchasers at said sale good and sufficient deed or deeds, in fee simple, to the premises sold, and forthwith make return of all his doings herein to this court; that the defendant, Edward Sheil, pay to the complainant the balance, if any there may be, due him over and above the proceeds of said sale, and that execution issue therefor according to law.

157 That from and after said sale the defendant, Edward Sheil, shall and do stand absolutely debarred and for-closed of and from all equity of redemption of, in, and to the aforesaid mortgaged premises, or so much thereof as may be sold at said sale; and it is further ordered, adjudged, and decreed that said defendant, who may be in possession of said premises, or any person or persons who has or have come in under him or either of them pending this suit, deliver up the possession of said premises to said purchaser or purchasers at said sale on demand made therefor by said purchaser or purchasers and the production of the master's deed ordered to be made; and it is further ordered, adjudged, and decreed that a copy of this decree, certified to by the register in chancery of this court, be sufficient process herein.

J. R. LEWIS, *Judge.*

158 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Wm. H. Andrews, clerk and register in chancery for the district court, first judicial district of said county and Territory, hereby certify that the foregoing is a true and correct copy of the decree in the foregoing-entitled cause, as now appears of record on page 587, in Book "D" of Records, now in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this the 27th day of June, 1874.

WM. H. ANDREWS, *Clerk.*

Endorsed: Chancery. Almas H. Reynolds *vs.* Edward Shiel. "*Alias*" order sale.

159	Original am't		$3,137 16
	Cr.		917 80
			$2,219 36
	Att'y fee		186 88
	Interest		183 34
			$2,589 58
	Cost and additional cost	$61 80,	paid by def.
	Order sale	3 50	

June 7th, 1874.

Satisfied in full.

Sheriff	10 90
Printers	10 00
Per cent. on sale	36 00

August 4th, 1874.

Returned August 4th, 1874. Wm. H. Andrews, clerk.

160 TERRITORY OF WASHINGTON, *County of Walla Walla,* } *ss:*

Be it remembered that at a regular term, to wit, the regular May term, A. D. 1874, of the district court of Washington Territory, and for the first judicial district thereof, holding terms at Walla Walla, Walla Walla county, in said Territory, begun and held, at the city of Walla Walla, on Monday, the 11th day of May, A. D. 1874, Hon. J. R. Lewis, sole judge, presiding, among other the following proceedings were had, to wit:

Nineteenth Judicial Day, September 14th, 1874.

ALMAS H. REYNOLDS, Plaintiff, *vs.* EDWARD SHEIL, Defendant. } Confirmation of Sale.

This action comes on for hearing on motion of plaintiff to confirm the sale of real estate heretofore made in this action by
161 the sheriff of Walla Walla county, and no objection to said sale having been filed herein, and the time allowed by law for filing the same having fully expired, and it appearing to the court that said sale and all proceedings relating thereto were regular and according to the laws of Washington Territory and the course and practice of this court—

Therefore, on motion of B. L. Sharpstein, Esq., attorney for plaintiff, it is ordered that said sale and all the proceedings relating thereto be, and the same are, in all respects confirmed, and the said sheriff is ordered to make a deed to the purchaser according to law.

J. R. LEWIS, *Judge.*

162

[United States internal revenue stamp, fifty cents, cancelled July 7, 1870.]

[United States internal revenue stamp, fifty cents, cancelled July 7, 1870.]

$1,000. WALLA WALLA, *July* 7, 1870.

On the second day of April next I promise to pay John Shauble or order the sum of one thousand dollars in U. S. gold coin, with interest at the rate of one per cent. per month, for value received.

EDW. SHIEL.

Endorsed: (E. Shiel's note, $1,000.) John Shauble. Received on the within note, July 27, '72, eighty-two ($82.69) dollars —, interest. Filed Oct. 2, 1873. Wm. H. Andrews, clerk.

163

[United States internal revenue stamp, fifty cents, cancelled July 7, 1870.]

[United States internal revenue stamp, cancelled July 7, 1870, twenty-five cents.]

[United States internal revenue stamp, twenty-five cents, cancelled July 7, 1870.]

$1,064. WALLA WALLA, *July*, 7, 1870.

[United States internal revenue stamp, twenty-five cents, cancelled July 7, 1870.]

[United States internal revenue stamp, twenty-five cents, cancelled July 7, 1870.]

On or before the 7th day of July, 1873, I promise to pay John Shauble or order the sum of one thousand and sixty-four dollars in U. S. gold coin, with interest at the rate of one per cent. per month, interest payable annually, for value received.

EDW. SHEIL.

164 Endorsed: (E. Sheil, note, $1,064.) John Shauble. Filed October 2, 1873. Wm. H. Andrews, clerk.

[United States internal revenue stamp, fifty cents, cancelled.]

[United States internal revenue stamp, fifty cents, cancelled.]

$1,000. WALLA WALLA, *July* 7, 1870.

On or before the 7th day of July, 1872, I promise to pay to John Shauble or order the sum of one thousand dollars in U. S. gold coin, with interest at the rate of one per cent. per month, interest payable annually, for value received.

EDW. SHEIL.

Endorsed: (E. Sheil, note, $1,000.) John Shauble. Filed October 2, 1873. Wm. H. Andrews, clerk.

165 This indenture, made the 8th day of August, A. D. one thousand eight hundred and seventy, between Edward Sheil, of the county of Walla Walla, in the Territory of Washington, the party of the first part, and John Shauble, of the same place, the party of the second part, witnesseth:

Three dollars and fifty cents internal revenue stamps on the notes secured by this mortgage cancelled July 7th, 1870.

That the said party of the first part, for and in consideration of the sum of three thousand and sixty-four dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and for the further consideration of securing payment of the sum of money hereinafter mentioned, do grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, forever all the following-described real estate lying and being in the county of Walla Walla, in the Territory of Washington, and more particularly described as follows, to wit: The northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section No. twenty
166 (20) and the southwest quarter of section No. seventeen (17), all in township No. seven (7) north, of range thirty-six (36) east, of the Willamette meridian, containing two hundred and forty acres; to have and to hold all and singular the above-described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part and his heirs the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs and against all and every person or persons lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

This conveyance is intended as a mortgage to secure the payment of the sum of $3,064, gold coin, *dollars*, with interest thereon, at the rate of one per cent. per month, according to the conditions of three certain promissory notes executed by Edward Sheil, the party of the first part, to John Shauble, the party of the second part, which
167 notes bear date on the 7th day of July, 1870; one of which notes is payable on the 2nd day of April next and is for the sum of one thousand dollars in gold coin, and one for one thousand dollars in gold coin is payable on the 7th day of July, 1872, and one for the sum of one thousand and sixty-four dollars in gold coin is payable on the 7th day of July, 1873. The interest on the last two described notes is payable annually, and these presents shall be void if such payment be made.

But in case default be made in the payment of the said principal sum and interest or any part thereof, as in said note provided, then it shall be lawful for the said party of the second part to sell the premises above described, with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of

the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and the further sum of five per cent. on the whole amount
168 found due on said notes as attorney's fees in the foreclosure of this mortgage, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

EDWARD SHEIL. [SEAL.]

Signed, sealed, and delivered in presence of—
B. L. SHARPSTEIN.
A. H. SIMMONS.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

Be it remembered that on this 8th day of August, A. D. one thousand eight hundred and seventy, before me, the undersigned authority in and for the said county and Territory, personally
169 appeared Edward Sheil, whose name is subscribed to the foregoing instrument as the party thereto, personally known to me to be the individual described in and who executed the said foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year in this certificate first above written.

[SEAL.] A. H. SIMMONS,
Notary Public.

Endorsed: Edward Sheil to John Shauble. Mortgage. Dated August 7, 1870.

Recorded, at the request of John Shauble, August 9, A. D. 1870, at 30 minutes past 4 o'clock p. m., in Book "B" of Mortgages, page 451.

H. M. CHASE,
170 *Co. Auditor Walla Walla Co., W. T.*

Filed October 2, 1873.

WM. H. ANDREWS, *Clerk.*

Know all men by these presents that John Shauble, of the city of Kalama, county of Cowlitz, Territory of Washington, the party of the first part, for and in consideration of the sum of thirty-one hundred and sixty ($3,160) dollars in gold coin to him in hand paid by A. H. Reynolds, of the county of Walla Walla and Territory of Washington, the party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold, assigned, trans-

ferred, and set over unto the said party of the second part a certain indenture of mortgage, bearing date the 8th day of August, A. D. one thousand eight hundred and seventy, made and executed by Edward Sheil, of the said county of Walla Walla and Territory aforesaid, to the said party of the first part to secure the payment of the sum of three thousand and sixty-four ($3,064) dollars, gold coin,
171 with interest thereon at the rate of one per cent. per month, according to the terms and conditions of three certain promissory notes or obligations in writing made by the said Edward Sheil to the said party of the first part and in said mortgage mentioned and described; which said promissory notes or obligations in writing and the money due or to become due, with the interest thereon, are duly assigned to the said party of the second part by the said party of the first part; which said indenture of mortgage was recorded in the office of the county auditor of the said county of Walla Walla, W. T., in Book "B" of Mortgages, on page 451, on the 9th day of August, A. D. 1870; to have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, to his and their use and benefit forever fully and completely.

Witness my hand and seal this 28th day of March, A. D. 1872.

JOHN SHAUBLE. [SEAL.]

Signed and delivered in presence of—
B. AKERS.
S. W. BEALL.

172 Be it remembered that on this 3rd day of April, A. D. 1872, personally came before me John Shauble, personally known to me to be the person described in and who executed the foregoing instrument of writing, and acknowledged to me that he executed the same freely and voluntarily for the purposes and uses therein mentioned.

In testimony whereof I have hereunto set my hand, at the city of Kalama, on this third day of April, A. D. 1872.

S. W. BEALL,
Justice of the Peace.

Endorsed: John Shauble to A. H. Reynolds. Assignment of mortgage. Filed October 2, 1873. Wm. H. Andrews, clerk.

Filed and recorded April 12, 1872, in Book C of Mortgages, page 317.

H. M. CHASE,
County Auditor, Walla Walla County, W. T.

173 *Certificate.*

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, A. Reeves Ayres, clerk of the district court of the Territory of Washington and for the first judicial district thereof, do hereby cer-

tify that the above and foregoing is a true and correct transcript of all papers filed and journal entries in the above-entitled cause, as the same now appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 18th day of November, A. D. 1884.

[SEAL OF COURT.] A. REEVES AYRES, *Clerk*,
By F. W. GOODHUE, *Deputy*.

The foregoing statements of facts and bill of exceptions is hereby settled and agreed to this the 25th day of December, 1884.

A. E. ISHAM, *Att'y for Hollon Parker.*
B. L. AND J. L. SHARPSTEIN,
Att'ys for George Dacres.

174 Now, January 30th, 1885, the foregoing bill of exceptions allowed by the court.

S. C. WINGARD, *Judge, &c.*

Endorsed: Filed as a statement of evidence and bill of exceptions December 4, 1884. A. Reeves Ayres, clerk.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory, Regular November Term, 1885, First Judicial Day, Monday, November 9th, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant. } 3959. Order.

Now, on this day, this action coming on for a hearing on this motion of defendant to correct and modify the journal entry
175 of what purports to be a notice of appeal given in the above-entitled action on July 27, 1885, and it appearing to the court that copies of the motion and notice of the hearing thereof had been duly served on the attorney for the plaintiff more than three days prior hereto, and the defendant appearing by B. L. and J. L. Sharpstein, his attorneys, specially as stated in said motion and notice, and the court being fully advised in the premises, said motion is granted and said journal entry amended by adding after the words "at chambers" the words "at Olympia, Thurston county, Washington Territory, while in attendance upon the supreme court," and after the word "this" the words "at Olympia, in Thurston county, Washington Territory."

S. C. WINGARD, *Judge, etc.*

Certificate.

TERRITORY OF WASHINGTON, } ss:
First Judicial District, }

I, Alfred N. Marion, clerk of the district court of Wash-
176 ington Territory and for the first judicial district thereof, holding terms at Walla Walla for the counties of Walla Walla and Franklin, in said Territory, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on writ of error to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and the seal of said district court this fourteenth day of June, A. D. 1886.

ALFRED N. MARION, *Clerk,*
By F. W. GOODHUE, *Deputy.*

U. S. DISTRICT COURT, } ss:
First Judicial District, Walla Walla, Washington Territory, }

In the Supreme Court of Washington Territory. July Term, A. D. 1886.

177 HOLLON PARKER, Plaintiff in Error, } 474. Appeal from
vs. First Judicial Court.
GEORGE DACRES, Defendant in Error. }

The defendant in error, appearing specially for the purpose of this motion only, moves the court to dismiss the appeal herein for the following reason:

Because no notice of appeal was given or served in this action or given in open court or at chambers within six months after the rendition of the judgment herein or at any time.

B. L. AND J. L. SHARPSTEIN,
Appearing Specially as as *Attorneys for the Defendant in Error for the Purpose of this Motion Only.*

I admit service of the within motion by copy in Walla Walla city' Washington Territory, this 8th day of July, 1886.

A. E. ISHAM,
Attorney for Appellant.

178 Received and filed July 13, 1886.

R. G. O'BRIEN, *Clerk.*

Office of the clerk of the supreme and district courts of the second judicial district of Washington Territory.

OLYMPIA, *January* 20, 1887.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant. } No. 474.

Received of R. G. O'Brien, clerk, the sum of twenty-one and twenty-five hundredth- dollars in full as attorney and brief fee in the above-entitled cause.

B. L. AND J. L. SHARPSTEIN,
Attorneys for Defendant in Error.

Filed January 26, 1887.

Office of the clerk of the supreme and district court- of Washington Territory, second judicial district. R. G. O'Brien, clerk.

179 No. 474.

Received of R. G. O'Brien, clerk supreme court of Washington Territory, transcript in the case of Hollon Parker *vs.* Geo. Dacres, case No. 474, as per order of the court this day made.

A. E. ISHAM,
Att'y for H. Parker.

In the Supreme Court of Washington Territory. January Term, 1887.

HOLLON PARKER, Plaintiff in Error,
vs.
GEORGE DACRES, Defendant in Error. } Petition for Rehearing on Motion.

Now comes the plaintiff in error and petitions the court for a rehearing in the above-entitled cause on the following grounds, to wit:

First. That the point upon which this case was dismissed was not raised in defendants in error'- brief or included in his motion
180 for dismissal, and according to rule XI had been by him waived, and his appearance in the supreme court for any purpose was a general appearance and waiver of the point upon which the court dismissed this case. The point and only point raised in argument by attorney for defendant in error or argued by plaintiff in error was the question of the judge's right to cause a journal entry to be made when the judge was outside of his district, and no objections were "taken and plainly stated" in the printed brief of defendant in error on the ground that defendant in error had not received notice of the proceedings at chambers under section 2140 of the code.

Second. The defendants (attorney) in error appeared in the court be-

low and moved for an amendment, in open court, of the journal entry giving the notice of appeal, and although the appearance may have been special for the purpose of amending the journal record, yet, so far as the regularity of giving of the notice is concerned, such
181 appearance was a waiver.

Third. Section 2140 of the code does not apply to notice of appeal at chambers. Such notices are *ex parte*—in the form of an order to be spread upon the journal. Under section 1, page 59, Statutes 1883, "No other service or notice of process shall be required" other than the journal entry.

There is nothing in the record to show whether the defendant in error did or did not have 3 days' notice of the proceedings at chambers, and the presumption is that all things were done which should have been done prior to the signing of the order by the judge below. This court cannot presume that the court below committed error or proceeded irregularly without such error or irregularity — is plainly shown by the transcript and in some manner assigned as error in this court. (2 Wash. Ter. Rep., p. 472.)

Fifth. We contend that, so far as notice of appeal given at Chambers under the statute 1883 is concerned, it supersedes and
182 repeals section 2140 of the code, because no service of the notice is required at chambers in open court.

A. E. ISHAM,
Att'y for Plaintiff in Error.

[Endorsed:] No. 474. Petition for rehearing. Hollon Parker *vs.* George Dacres. Received and filed Jan. 11, 1887. R. G. O'Brien, clerk. A. E. Isham, att'y.

#474.

Execution Docket.

Judgment debtor: Hollon Parker.
Judgment creditor: George Dacres.
Judgment: Dismissal of appeal and costs.
Costs: $34.30.
Time of entry: January 5, 1887.
When [where] entered: Journal, vol. 2, p. 528.

Clerk's fees	$11 05
Sheriff's fees	
183 Binding transcript	2 00
Attorney's fees	10 00
Printing brief	11 25
Miscellaneous	
Total	$34 30

Supplemental Proceedings.

Date.
1885, Oct. 15.—Execution issued to sheriff of Walla Walla Co.
Nov. 1.—Execution returned with $34.30.

TUESDAY, *July* 14, 1885.

HOLLON PARKER
vs.
GEORGE DACRES. } 420. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the first judicial district of Washington Territory, holding terms at Walla Walla, upon the motion to dismiss the appeal herein, and upon the argument of counsel, and the court having fully considered the
184 same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 14th day of July, A. D. 1885, on motion of B. L. and J. L. Sharpstein, Esquires, of counsel for defendant in error, considered, adjudged, and decreed that the appeal from the judgment of the said district court be, and the same is hereby, dismissed with costs, and that the said George Dacres, defendant in error, recover from and of the said Hollon Parker, plaintiff in error, the costs of this action, taxed and allowed at $39.75, and that execution issue therefor; to which ruling of the court plaintiff, by his counsel, excepts, and said exception is allowed.

MONDAY, *January* 17, 1887.

HOLLON PARKER, Plaintiff in Error,
vs.
GEORGE DACRES, Defendant in Error. } 474. Rule on Petition for Rehearing and Exception.

185 In this cause, the court having heretofore heard counsel for plaintiff in error upon his petition for a rehearing, the motion of defendant in error to dismiss the appeal herein, and the court having fully considered the same and being fully advised in the premises, it is now, on this 17th day of January, 1887, ordered that said rehearing be, and the same is, denied; to which rulings of the court denying said petition for a rehearing, and the further ruling of the court allowing said motion to dismiss the appeal herein, and the further judgment of the court dismissing said appeal and taxing the costs against the plaintiff in error counsel for plaintiff in error excepts, and said exception is allowed.

HOLLON PARKER
vs.
GEORGE DACRES. } 474. Order to Take Transcript.

186 On motion of attorney for plaintiff in error it is ordered that he have leave to take the transcript of the record in this cause for the period of sixty days from this January 17, 1887.

SATURDAY, *July* 23, 1887.

HOLLON PARKER
vs.
GEORGE DACRES. } 473.

Ordered, That counsel for plaintiff in error have leave to withdraw the transcript of the record in this cause for the purpose of preparing an appeal herein.

HOLLON PARKER
vs.
GEORGE DACRES. } #420. Opinion.

By Roger S. Greene, chief justice.

This cause has been brought here under the provisions of
187 the appeal act of 1883, which allow all cases of whatever jurisdiction to be taken to this court by the simple device of a notice of appeal given and entered in the lower court. The uniformity of mode of proceedure prescribed by that act does not do away with the essential distinctions between causes at law and causes in equity for purposes of review. Rule V of this court, in view of these distinctions and to facilitate the business of the court and to harmonize the appellate practice under the act of 1883 with that under the code, has provided in substance that in all law causes brought up under the act of 1883 an assignment of errors shall be made in writing and filed with the clerk of the proper district court, to be certified to this court as a part of the record, and that a copy of such assignment shall be served on the adverse party within twenty days after the entry in the journal of the district court
188 of the notice of appeal. Plaintiff in error did not serve a copy of his assignment of errors in this cause within the time limited, and on that ground defendant in error moves to dismiss the appeal.

No good reason for denying the motion appears. Doubtless Rule V, ever since its adoption, has been part of the law applicable to suitors in this court, without regard to when it first was published in print. Let the motion to dismiss the appeal be granted.

ROGER S. GREENE,
Chief Justice.

We concur.

JOHN P. HOYT,
Associate Justice.

GEORGE TURNER,
Associate Justice.

TERRITORY OF WASHINGTON, }
County of Thurston, } *ss:*

I, Francis Henry, clerk of the supreme court of Washington Territory, hereby certify that the annexed and foregoing is a full, true,

and correct copy of the entire record in the case of Hollon
189 Parker *vs.* George Dacres as the same appears upon the records and files of my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 15th day of January, A. D. 1889.

[Seal of Supreme Court of Washington Territory.]

FRANCIS HENRY, *Clerk.*

(Endorsed:) In the supreme court Washington Ter. Hollen Parker, plaintiff in error, *vs.* George Dacres, defendant in error. Transcript.

(Endorsed on cover:) Supreme Court U. S. 1888, October term. No. 5. Original. *Ex parte:* In the matter of Hollon Parker, petitioner. Returned to rule. Filed Jan'y 28, 1889.

190 In the Supreme Court of the United States.

No. 5. Original.

Ex Parte: In the Matter of the Application of HOLLON PARKER for a Writ of Mandamus

vs.

THE SUPREME COURT OF WASHINGTON TERRITORY, &c., Respondents.

TERRITORY OF WASHINGTON, } *ss:*
County of Walla Walla, }

I, John P. Hoyt, being duly sworn, say that on January 5th, 1887, and for a long time prior thereto, I was one of the associate justices of the supreme court of Washington Territory, and was a member of said court and sitting and acting as such at the time the case of Parker *vs.* Dacres, referred to in the petition herein, was heard and determined on the motion of the attorneys for defendant in error, George Dacres, to dismiss the appeal in said action for want of notice of appeal; that the argument on said motion to dismiss
191 was oral; that, to the best of affiant's recollection and belief, on this argument the attorneys for defendant in error called the attention of the court to section 2140 of the code of said Territory, and claimed that the act of 1883 had not repealed the same; that the said section had not been complied with, and therefore the pretended notice was no notice.

JOHN P. HOYT.

Subscribed and sworn to before me this 14th day of January, 1889.

[SEAL.] CHARLES H. KITTINGER,
Notary Public in and for Washington Territory.

(Indorsed:) Sup. Court U. S. 1888, Oct'r term. No. 5. Orig'l. *Ex parte:* In the matter of Hollon Parker, petitioner. Supplemental return to rule. Office Supreme Court U. S. Filed Jan. 28, 1889. James H. McKenney, clerk.

192 In the Supreme Court of the United States.

No. 5. Original.

Ex Parte: In the Matter of the Application of HOLLON PARKER for a Writ of Mandamus
vs.
THE SUPREME COURT OF WASHINGTON TERRITORY, &c., Respondents.

TERRITORY OF WASHINGTON, }
County of Walla Walla, } ss:

I, Roger S. Greene, being duly sworn, say that I was on the 5th day of January, 1887, and for a long time prior thereto, chief justice of the supreme court of Washington Territory, and that I presided over said court as such at the time the case of Parker *vs.* Dacres, referred to in the petition herein, was heard and determined on the motion of the attorneys for defendant in error, George Dacres, to dismiss the apppeal in said action for want of notice of appeal; that
193 the argument on said motion to dismiss was oral; that to the best of affiant's recollection and belief and on this argument the attorneys for defendant in error called the attention of the court to section 2140 of the Code of said Territory and claimed that the act of 1883 had not repealed the same; that the said section had not been complied with, and therefore the pretended notice was no notice.

ROGER S. GREENE.

Subscribed and sworn to before me this 14th day of January, 1889.

[SEAL.] CHARLES H. KITTINGER,
Notary Public in and for Washington Territory.

(Indorsed:) Sup. Court U. S. 1888, Oct'r term. No. 5. Orig'l. *Ex parte:* In the matter of Hollon Parker, petitioner. Supplemental return to rule. Filed Jan. 30, 1889.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 5. ORIGINAL.

Ex. Parte: In the Matter of HOLLON PARKER, Petitioner.

BRIEF ON PART OF PETITIONER.

STATEMENT OF CASE.

JOHN H. MITCHELL,
Attorney for Petitioner.

Thomas McGill & Co., Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 5. Original.

EX PARTE: IN THE MATTER OF HOLLON PARKER, PETITIONER.

Brief on Part of Petitioner.

STATEMENT OF THE CASE.

This is an application, under section 688 of the Revised Statutes, for a writ of mandamus directed to the Supreme Court of Washington Territory, to reinstate an appeal from a decree of the District Court of the Territory for the first Judicial District, in an action of ejectment at law wherein Hollon Parker is plaintiff and George Dacres is defendant.

The petition avers such appeal or writ of error was erroneously dismissed, and the cause stricken from the docket of said Supreme Court, January 5th, 1887.

The facts of the case are fully stated in the petition.

MANDAMUS IS THE PROPER REMEDY.

By section 688 of the Revised Statutes of the United States it is provided, among other things, as follows:

"SEC. 688. The Supreme Court shall have power to issue writs of prohibition, &c., * * * writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States." * * *

Where the Supreme Court of a Territory erroneously dismisses an appeal, the sole remedy of appellant is by an original action in the Supreme Court of the United States by petition for mandamus.

Insurance Co. *v.* Comstock, 16 Wall., 258.
Railroad Co. *v.* Wiswell, 23 Wall., 507.
Harrington *v.* Haller, 111 U. S., 796.
Ex parte Hollon Parker, 120 U. S., 738.

Such judgment of dismissal is not a final judgment, or final decision within the meaning of these terms as used in sections 702 and 1911 of the Revised Statutes regulating writs of error and appeals to the Supreme Court of the United States from the Supreme Court of Washington Territory, and hence appellant in said cause and petitioner herein has no remedy by appeal.

The dismissal of the appeal or writ of error was a refusal to hear and decide the cause. The remedy, therefore, is by mandamus to compel the court to entertain the case and proceed to its determination, not by appeal or writ of error to review what has been done.

Ex parte Bradstreet, 7 Peters, 647.
Ex parte Newman, 14 Wall., 165.
Harrington *v.* Haller, 111 U. S., 797.
Ex parte Hollon Parker, 120 U. S., 738.

This court in the case *Ex parte* Hollon Parker, 120 U. S., 738, opinion by the late Mr. Justice Matthews, said:

"Although the Supreme Court of Washington Territory rendered judgment in this case for costs against Parker, the appellant, it nevertheless dismissed his appeal for want of jurisdiction in that court to entertain it.

There were two grounds alleged in the motion to dismiss, and in the opinion of the court giving its reasons for granting the same, on which it was contended and decided that Parker had failed to take the necessary preliminary steps to transfer his cause from the District Court to the Supreme Court of the Territory. It was adjudged against him that he had not complied with the requisition of the law prescribing the conditions precedent to perfecting his appeal. The Supreme Court refused to hear the cause and to decide it upon its merits, because it considered that the cause was not lawfully before the court; that the parties were not in court for the purposes of an appeal. This presents a case for the exercise of the jurisdiction of this court in mandamus according to the principles and practice applicable thereto. That writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged errors occurring in the exercise of its judicial discretion within its jurisdiction. As was said in *Ex parte* Brown, (116 U. S., 401,) 'Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction.' In that case the motion for the writ was denied because the court below, having entertained jurisdiction of the cause, had dismissed it for want of due prosecution. That is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action; although the statement in the report does not sufficiently recite the facts from the record on which the opinion is based. In the present case, the Supreme Court of Washington Territory, on consideration, decided that it could not legally exercise jurisdiction upon the appeal of the petitioner, Parker. The question for our determination is *whether that decision was in conformity with law.*"

The motion upon which the appeal or writ of error was dismissed was as follows:

"The defendant in error, appearing specially for the purpose of this motion only, moves the court to dismiss

the appeal herein for the following reason: Because no notice of appeal was given or served in this action or given in open court or at Chambers within six months after the rendition of the judgment herein, or at any time." (Printed record, p. 62.)

The ground upon which the appeal was dismissed is clearly stated in the opinion of the court, as follows:

"This motion to dismiss must be granted, because the notice of appeal, not being one given in open court, and being in its nature an application for an order allowing the appeal, was entertained by the judge without the preliminary notice to the adverse party prescribed by section 2140 of the Code." (See Petition, p. 10; record of return, p. 3.)

It would seem from the record that the principal, if not, indeed, the only question argued in support of the motion to dismiss in the court below was as to the right of Judge Wingard to order a notice of appeal to be spread upon the records of the First Judicial District Court while temporarily out of his district, and in attendance upon the Supreme Court of the Territory, at Olympia, Thurston county; whereas the *sole* ground stated by the court as reason for dismissal is that, inasmuch as the notice of appeal was not given in open court, but at Chambers, that a notice to the adverse party, as prescribed by section 2140 of the Washington Code of 1881, was necessary, and, the record not disclosing that any such notice was given, that therefore it was no appeal, and the Supreme Court had no jurisdiction. The court below, it will be observed, therefore, seemed to place no reliance upon the point argued by counsel, but ignored it entirely in the opinion, and dismissed the appeal or writ of error solely upon a ground that was not argued nor even referred to by counsel, if we take the averments of the petition herein on that subject; although it is true, according to the return in this case, (see affidavits of the late Chief

Justice Roger S. Greene and Associate Justice John T. Hoyt, printed record of returns, pages 67 and 68), the point upon which the appeal was dismissed was, according to their best recollection and belief, called to the attention of the court.

The Appeal.

The appeal in the case of Parker *v.* Dacres, now in question, was taken or sought to be taken, as appears from the record herein, under and in pursuance of an act of the Legislature of the Territory of Washington entitled "An act in relation to the removal of causes to the Supreme Court," approved November 23d, 1883, and of which the following is a full copy:

"An act in relation to the removal of causes to the Supreme Court.

"Sec. 1. Be it enacted by the Legislative Assembly of Washington Territory, that any person desiring to remove a cause from any District Court of Washington Territory, may do so, either in person or by his attorney of record, and in the following manner: *Such person or attorney may give notice in open court, or at Chambers, that he appeal such cause to the Supreme Court of the Territory; such notice shall, by order of the court, or judge having Jurisdiction of the cause, be entered in the journal of such court, and no other service or notice shall be required;* and thereupon the clerk of such court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be filed with the clerk of the Supreme Court within the time allowed by law; and thereupon the Supreme Court shall have complete and perfect jurisdiction of such cause.

"Sec. 2. That the Supreme Court shall hear and determine all causes removed thereto, in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities.

"Sec. 5. The notice of appeal hereinbefore provided for may be given at any time within six months after the rendition of the judgment, order, or decision intended to be removed to the Supreme Court.

"SEC. 6. All acts and parts of acts, so far as they conflict herewith, are hereby repealed."
Approved November 23d, 1883.

The judgment in the case of Parker *v.* Dacres was entered in the District Court of the First Judicial District for Washington Territory, S. C. Wingard, judge, February 14th, 1885. (See petition herein, page 3, and return, page 27.)

On July 27th, 1885, or less than five-and-a-half months subsequent to the entry of judgment, said Hollon Parker, appellant therein, and petitioner herein, while the Honorable S. C. Wingard, the judge of the said District Court of the First Judicial District of Washington Territory, was in attendance at the July Term of the Supreme Court of Washington Territory, begun and held at Olympia, Thurston county, Washington Territory, appeared before said judge at his Chambers, and gave the following notice of appeal in said cause, and in pursuance of which the following order was on that date, July 27th, 1885, made in writing by said Judge Wingard in said cause, and which was subsequently entered of record in said cause in said District Court. (See petition, page 4, and return, page 27.)

NOTICE OF APPEAL; REQUIRED BY ACT OF NOVEMBER 23D, 1883, *supra*.

At Chambers at Olympia, Thurston county, Washington Territory, July 27th, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant.
} Notice of Appeal.

Comes now the above-named plaintiff, by his attorney, A. E. Isham, and gives notice at Chambers to the above-named defendant and his attorneys, and to the clerk of

this court, and to all others, that he appeals this cause to the Supreme Court of this Territory by way of writ of error, and requests that this notice be entered of record upon the journal of this court, which is accordingly here now ordered by the court that said notice of appeal be entered of record on said journal, and said appeal is allowed.

Done at Chambers at Olympia, Thurston county, Washington Territory, this the 27th day of July, A. D. 1885.

S. C. WINGARD,
Judge, &c.

That thereupon, after the term in which said judgment had been rendered, and after said notice of appeal had been given and entered of record on said journal of said court, and said cause fully removed from the District Court of the First Judicial District of Washington Territory to the Supreme Court of said Territory, under and by virtue of the act of the Legislative Assembly aforesaid, the defendant, George Dacres, appeared by his attorneys, B. L. and J. L. Sharpstein, at the next term of said District Court, after the judgment had been rendered and the notice of appeal had been given, and the time for appeal or taking out a writ of error had fully expired, and the following proceedings were had, to wit:

In the District Court of the Territory of Washington and for the First Judicial District thereof, holding terms at Walla Walla for the counties of Walla Walla and Franklin, in said Territory.

Regular November Term 1885. First Judicial Day—Monday, November, 9th, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant.
} Order—No. 3959.

Now, on this day, this action coming on for a hearing on the motion of defendant to correct and modify the journal entry of what purports to be a notice of appeal

given in the above-entitled action on July 27th, 1885, and it appearing to the court that copies of the motion and notice of the hearing thereof had been duly served on the attorney for the plaintiff more than three days prior hereto, and the defendant appearing by B. L. and J. L. Sharpstein, his attorneys, specially as stated in said motion and notice, and the court being fully advised in the premises, said motion is granted and said journal entry amended by adding after the words "at Chambers" the words "at Olympia, Thurston county, Washington Territory, while in attendance upon the Supreme Court," and after the words "done at Chambers," and before the word "this," the words "at Olympia, in Thurston county, Washington Territory."

S. C. WINGARD,
Judge, &c.

In support of the petition for a mandamus in this cause it is contended that the Supreme Court of Washington Territory committed the following errors, which should be corrected by a writ of mandamus issuing out of this court and directed to the court below:

First. The court erred in holding that section 2140 of the Code of Washington Territory was applicable to appeals taken under the act of 1883.

Second. The court erred in holding that where a notice of appeal, under the act of 1883, not given in open court, was entertained by the judge without the preliminary notice required by section 2140 of the Washington Code of 1881, the appeal should be dismissed.

Third. The court erred in failing to hold that the appearance of appellant in the court below, moving to amend the order of notice of appeal was a waiver of the notice required, if such notice were required, by section 2140 of the code of 1881.

It is also now further insisted on the part of respondents that Judge Wingard had no jurisdiction to enter-

tain a notice of appeal at Chambers opened out of his district—although such Chambers were opened, and such notice of appeal entertained, and appeal allowed, at Olympia, while sitting on the Supreme bench. This contention, it is insisted, cannot be maintained, and it was not, in fact, credited by the court below.

Waiving, for the present, the question as to the right of the judge to allow the appeal while out of his district, attention will be given as to the correctness of the ruling of the Supreme Court in holding that section 2140 of the Code of 1881 is applicable, and must be recognized in taking appeals under the act of November 23d, 1883, *supra*.

The question then arises whether or not, under the act of the Territorial Legislature of the Territory of Washington, approved November 23d, 1883, *supra*, it is a necessary jurisdictional requirement where a party, in pursuance of the provisions of that statute, gave notice of appeal *at Chambers* that he should serve a three days' notice upon the opposite party of his intention to give such notice of appeal at Chambers as specified in section 2140 of the Code of Washington Territory of 1881. It is confidently insisted that this notice is *not* necessary. The act of November 23d, 1883, has been given *in extenso*, *supra*, page 5.

This court will observe that at the time the appeal in the case at bar was taken, or attempted to be taken, from the judgment of the District Court to the Supreme Court there were two distinct and separate modes by which an appeal or writ of error could be taken from a judgment of a District Court to the Supreme Court of Washington Territory. The one mode is provided by sections 458 and 459 of the Code of Washington of December 7th, 1881, while the other mode is provided by the act approved November 23d, 1883, The former, or sections 458 and 459 of the Code of 1881, are as follows:

"SEC. 458. An appeal or writ of error is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney. Every notice of appeal or writ of error must be signed by the party taking the same, or his attorney of record, and must contain the title of the District Court in which the proceedings sought to be reviewed were had; the title of the cause as in the District Court; a particular description of the judgment, decree, or order sought to be reviewed; and, in case of appeal, a particular description of every decision, ruling, order, or decree by which the appellant claims to have been aggrieved, and which he relies upon as ground for a reversal or modification of the judgment, order, or decree; and, in case of a writ of error, a particular description of the errors assigned.

"SEC. 459. An appeal shall not be perfected until the notice thereof has been served upon the adverse party, or his attorney of record. Upon payment of his fees, the clerk shall forthwith transmit by mail, express, or messenger—not a party nor the attorney of a party—a transcript of the record in the cause, or so much thereof as the appellant or plaintiff in error, in writing, in the notice as directed, to which shall be appended copies of the notice of appeal and the supersedeas bond, if any."

While the act of November 23d, 1883, has been given *supra*, page 5, it is very clear that section 2140 of the Code of 1881, providing for notice of certain motions at Chambers and relied on by the Supreme Court of the Territory, cuts no figure whatever in appeals taken under sections 458 and 459 of the act of 1881. It is clear and plain beyond the power of controversy that the Legislature in enacting section 2140 of the Code of 1881, and which reads as follows:

"SEC. 2140. When a party to an action has appeared in the same, he shall be entitled to at least three days' notice of any trial, hearing, motion, or application to be had or made therein before any judge at Chambers, which

shall be in writing, setting forth the nature of the motion or application and the grounds thereof, and specifying the time and place where the same will be made, and which may be served on the adverse party or his attorney." * * *

—had no thought that it should apply in any manner to proceedings after final judgment in a District Court relating to the transfer of a case by appeal or writ of error from the District Court to the Supreme Court. Under the provisions of the Code of 1881, referred to, relating to appeals and writs of error, no provision whatever is made for any proceedings at Chambers, and no three days' notice could be given or required under said Code; hence no such notice could even by implication be required to be given under the statute of 1883, such as is contemplated under section 2140 of the Code of 1881. Sections 458 and 459 of the Code of 1881 provide for their own notice of appeal, independent of section 2140, which has no relation whatever, and it never was intended it should have, to proceedings under the Code of 1881 *relating to appeals or writs of error*. Section 2140 of the Code of 1881, referred to, it is evident, was intended to apply *solely* to motions made in a case after appearance and *prior* to the initiatory proceedings for appeal or writ of error. Aside, then, from the fact that the act of November 23d, 1883, is of itself an independent piece of legislation providing for appeals and *writs of error* to the Supreme Court, it is plainly apparent that inasmuch as section 2140 of the Code of 1881 had no relevancy or application, whatever, to proceedings relating to appeals or writs of error under the Code of 1881 of which it is a part and portion, that, therefore, it cannot, with any kind of propriety, be held to in any manner, relate to, or control proceedings relating to an appeal under the independent statute of November 23d, 1883.

The act of November 23d, 1883, is in and of itself a complete piece of legislation independent of all other *acts* and *parts of acts*, under and by virtue of which parties litigant were permitted to transfer their cases by appeal or writ of error from judgments or decrees rendered in the District Courts to the Supreme Court of the Territory. It is not an amendment of the Code of practice of 1881. It is an independent act as indicated in its title, "in relation to the removal of causes to the Supreme Court." But if regarded as an amendment to the Code of 1881, or as supplemental legislation, then clearly it is so plain and positive in its terms as to the *essentials* in removing a cause from a District Court to the Supreme Court as to repeal the provisions of section 2140 of the Code of 1881.

"Such person or attorney," says the act of 1883, "may give notice in open court, *or at Chambers*, that he appeal such cause to the Supreme Court of the Territory. Such notice shall by order of the court, *or judge* having jurisdiction of the cause, be entered in the journal of such court, *and no other service or notice shall be required.*"

Again, section 6 provided that "all acts and parts of acts, so far as they conflict herewith, are hereby repealed."

There is in this act no suggestion that when the notice of appeal was given "*at Chambers*" there should be a previous notice to the adverse party of three days of such intention—nothing of that kind; nor is there in the act from beginning to the end any indication that *any* of the provisions of the act of 1881, or of any other act, should have consideration or connection with the proceedings relating to an appeal under and in pursuance of its provisions.

The Code of 1881 was complete in itself. The section, 2140 in that Code had nothing whatever to do with proceedings relating to appeals or writs of error under that

Code, which treated of many subjects in addition to that of the removal of causes to the Supreme Court by appeal and writ of error, whereas, the act of November 23d, 1883, treated of but *one* subject, that of removal of causes to the Supreme Court, and was, in, and of itself, a complete and perfect Code on that one subject.

It is confidently insisted, therefore, the Supreme Court of Washington Territory was in error in holding a notice as provided for in section 2140 of the Code of 1881 was necessary in taking an appeal at Chambers under the act of 1883.

But, again, the Supreme Court of the Territory was in error in assuming, even were it required that the three days' notice of the proceedings at Chambers had not been given. There is nothing in the record to show that such notice was *not* given, and the presumption is that all things were done that should have been done prior to the signing of the order of the judge below allowing the appeal. The court had no right to presume that the judge at Chambers proceeded irregularly, or, in the absence of any proper notice without such error or irregularity, is disclosed by the transcript.

2 Wash. Ty. Rep., 472.

But conceding the construction claimed for these sections by the respondents, it is respectfully insisted that by coming in the court within the district as did Mr. Dacres through his attorney, and moving to correct and modify the journal entry of the notice of appeal given at Chambers on July 7th, 1885, so that it should appear that such notice of appeal was given at Olympia, Thurston county, Washington Territory, while in attendance upon the Supreme Court (see record of return, page 61), they have waived any objection that might otherwise have been urged against the notice of appeal.

It is urged in the return of the judges herein as a reason why a writ of mandamus should not be awarded in this case that since the granting of the motion and the dismissal of the appeal in the case at bar, the said Supreme Court of Washington Territory has construed the act of 1883, and section 2140 of the Code of 1881; and in support of this claim one case is cited, that of Alexander Melville, W. G. Melville, and L. O. Hamilton *v.* Chehalis County. (See record of return, pages 3 and 4.) This is the only case cited either prior, or subsequent, to the order of dismissal herein complained of, and this case, it will be observed, was decided not only at the same term of the court, but on the day following the decision of dismissal of the case at bar. The case of Parker *v.* Dacres was dismissed January 5th, 1887 (see printed record of return, page 3), while the case of Melville *et al. v.* Chehalis County, was dismissed January 6th, 1887. The case at bar is reported on page 12, vol. 3, of Washington Territory reports, while the other case is to be found on page 14 of the same volume—Chief Justice Greene delivering the opinion in the two cases.

It will be observed, moreover, that Mr. Justice Greene in delivering the opinion in the latter case, while holding that section 2140 of the Code of 1881 was applicable, conceded that if the appellant was actually present or there was a waiver of notice, that then actual notice as required by section 2140 was not necessary to confer jurisdiction.

But again it is insisted that no amount of rulings or constructions of these statutes by the Supreme Court of the Territory will establish a rule that must govern this court, provided in the judgment of this court such construction by the Territorial Court is erroneous.

The rule that the construction as to property rights placed by the Supreme Court of a State on a State law is accepted by the Supreme Court of the United States is not applicable to the question now under consideration,

nor to the rulings of the Supreme Court of the Territory relative to the right of a party to appeal his cause from what he believes to be an erroneous judgment of the Territorial District Court to the Supreme Court of such Territory.

AS TO THE RIGHT OF JUDGE WINGARD TO SIGN AN ORDER OF A NOTICE OF APPEAL OUT OF HIS DISTRICT.

The facts show, as disclosed by the record in this case, that S. C. Wingard, judge of the First Judicial District Court, and before whom, as judge of said District Court, the case of Parker *v.* Dacres *et al.*, herein, was tried originally, was in attendance upon the Supreme Court of the Territory, and required by law and his official duties to remain there. It was an *ex parte* application for an order to be entered upon the journal giving a notice of appeal, and it is insisted the judge had jurisdiction to grant or make such order anywhere within the Territory in which he was a duly-appointed judge.

4 Wait's Practice, 592.

2 John, 198.

It is insisted in the return herein that section 1874 of the Revised Statutes of the United States and section 2138 of the Code of Washington Territory, taken together, limit the power of the judges of the District Courts in Washington Territory to acts done within the territorial boundaries of their respective districts. Section 1874 of the Revised Statutes reads as follows:

"SEC. 1874. The judges of the Supreme Court of each Territory are authorized to hold court within their respective districts in the counties wherein, by the laws of the Territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes except those in which the United States is a party."

While the section of the Code of Washington Territory is as follows:

"SEC. 2138. The several judges of the district courts in this Territory, and each of them, in their respective districts may, at Chambers, in vacation, entertain, try, hear, and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury, and all rulings, orders, judgments, and decrees made or rendered by a judge of the District Court at Chambers may *be entered of record in vacation*, and shall have like force and effect as though made or rendered at a regular term of the District Court."

It is respectfully insisted no such construction should be given to these statutes. Upon the contrary, it is respectfully suggested that the words in the Territorial statute, "in their respective districts," simply mean that the act or thing done by the judge shall *relate* to some matter or thing *pending* in the district of which he is the judge. In other words, that the judge of the first district, for instance, could not entertain a motion or decide a matter at Chambers relating to a suit pending in another district of the Territory. It never was intended, it seems to me, that a judge whose duty called him for certain months in each year to the capital of the Territory for the purpose of sitting on the Supreme bench, had not the power to open his Chambers at that point and entertain a motion—or decide it, for that matter—in an action or suit pending in his proper district.

The case of Packard *v.* Packard, 7 "Pacific Reporter," 628, cited by counsel for Dacres in his motion in the Supreme Court of the Territory to dismiss appeal (see printed record of return, p. —) is in no sense applicable to the question involved in this case. In that case the court in regular term (March Term, 1884) heard and decided an application for divorce, and a decree was entered during that term of court granting the wife a divorce as

prayed for in her petition, and also awarded her the custody of her four children. No order or judgment, however, was rendered specifying the amount of money the defendant would be required to pay for the support of the wife and children. The court then adjourned *sine die* on March 11, 1884. Subsequently, by consent of parties and their respective counsel, they appeared before the judge of the court who tried the cause, and on March 21st, 1884, at Junction City, Kansas, and then and there agreed upon a journal entry, which was signed by the judge. This entry provided that the defendant should pay to the wife for the support of her minor children, so long as she should have the care and custody of them, $150 per annum for each of the children, and $200 to the wife for life, or until she should marry. These orders were then, under the direction of the judge, filed in the proper court *nunc pro tunc*, as of March 11th, the date when the court adjourned for the term. On review, the Supreme Court of the State held that, inasmuch as these orders were not made or rendered during the March Term of the District Court of Dickinson county, they were void, and improperly embraced in the journal entry.

The point was not that the judge acted out of his Territorial jurisdiction, but rather that he acted *out of time*. The term of the court having expired, the case had passed beyond his jurisdiction. Had these orders of March 21st been made on that date in the same court-room in which the cause was originally tried and decree of divorce entered, they would, it is submitted, have been equally void, for the reason just stated. This case, therefore, has no relevancy whatever to the case at bar.

Again, the point in the case of Earles *v.* Earles (27 Kan., 538) cited by counsel in favor of their motion to dismiss the appeal in the case at bar, and referred to in Packard *v.* Packard *supra*, and which will doubtless be

referred to in respondent's brief, was similar to that involved in the latter case. The court had rendered a decree *out of term*, and the Supreme Court, in reviewing it, said:

"We think the judgment itself is a nullity. The judge of the court below had no power to render any judgment or decree in vacation. The statute provides for regular terms of the court to be held for the trial of causes, and it does not provide for the rendering of judgments or decrees at any time except during the term."

Nor is the case of The People *ex rel.* Newell *et al. v.* Montgomery Common Pleas, (18 Wend., 649,) and cited in record (p. 2), and which will doubtless be referred to in opposing counsel's brief, an authority in this case. There the judge of the court allowed an appeal from a decision of a justice of the peace, while the judge was at Albany, New York, and decided out of and absent from the county for which he was appointed, and in which alone he had jurisdiction. In that case the court very properly refused a mandamus to vacate the rule quashing the appeal. The case at bar would be parallel to the case in Wendell *supra*, had the order directing the entry of notice of appeal been made by Judge Wingard in the Territory of Idaho or Montana, or in the State of Oregon, or at some other point outside the Territorial jurisdiction for which he was appointed, namely, the Territory of Washington.

The Chief Justice and the Associate Justices for Washington Territory are not appointed for certain districts or counties. They are not the judges of parts or portions of the Territory, nor judges of certain counties or certain districts; they are judges of the Supreme Court of the Territory, and assigned to duty as District Judges. They are appointed as and for the Chief Justice and the Associate Justices of the Supreme Court of Washington

Territory, and by virtue of such office they have jurisdiction to hold terms of the District Courts, and are assigned, respectively, to duty in certain districts while not on duty at the Capital holding terms of the Supreme Court of the Territory.

Section 2113 of the Code of Washington (188) provides as follows:

"SEC. 2113. The Supreme Court of the Territory shall be held at Olympia on the second Monday of July in each year."

Section 1864, R. S. U. S., provides as follows:

"SEC. 1864. The Supreme Court of every Territory shall consist of a Chief Justice and two Associate Justices, any two of whom shall constitute a quorum, and they shall hold their offices for four years, and until their successors are appointed and qualified. They shall hold a term annually at the seat of government of the Territory for which they are respectively appointed."

Section 1873 R. S. U. S., provides as follows:

"SEC. 1873. Temporarily and until otherwise provided by law, the Governor of every Territory which may be hereafter established" (this is the act of Sept. 9, 1850), "shall define by proclamation the Judicial Districts of such Territory, and assign the judges appointed for such Territory to such several districts, as well as fix the times and places for holding courts in the respective county subdivisions of each Judicial District."

Section 1917 R. S. U. S., provides as follows:

"SEC. 1917. The District Court for the several districts in the Territory of Washington, shall be held at such times and places in the districts, not exceeding three places in each district, as the Legislative assembly of the Territory may by law determine. * * *"

Section 1918 R. S. U. S., being the act of February 9th, 1863, provides as follows:

"SEC. 1918. The Legislative Assemblies of New Mexico, Washington, Colorado, Dakota, Arizona, and Wyoming Territories, may assign the judges appointed for such Territories respectively to the several Judicial Districts thereof in such manner as each Legislative Assembly deems proper and convenient."

It is respectfully submitted, therefore:

First. The judge of the District Court did not act beyond his jurisdiction in directing a record entry of notice of appeal while he was outside the district to which he had been assigned, and was engaged in his official duty as required by law, as a member of the Supreme Court of the Territory, at the Capital of the Territory.

Second. That section 2140 of the Code of 1881, has no application, whatever, to proceedings on appeal or writs of error, under the Code of 1881. A *fortiori*, may it be said that such section cannot possibly have any relation or application to the provisions relating to an appeal contained in the independent statute of Nov. 23d, 1883, and, therefore, it follows that inasmuch as Parker's appeal had been duly taken and perfected and because it had been properly transferred from the District to the Supreme Court of the Territory, and that the latter having acquired jurisdiction thereof, that such court should have proceeded in the exercise of its jurisdiction to hear and determine the same upon its merits, and having failed to do so, and having erroneously dismissed such appeal, the writ of mandamus in this case should be made mandatory.

All of which is respectfully submitted.

JOHN H. MITCHELL,
Attorney for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 5. Original.

EX PARTE: IN THE MATTER OF HOLLON PARKER, PETITIONER.

Demurrer to Returns.

Now comes Hollon Parker, the petitioner, by his attorney, and excepts and demurs to the return filed herein January 28th, 1889, (printed record, pages 1–66 and part of 67, inclusive), and also to supplemental return filed January 28th, 1889, and January 30th, 1889, (printed record, pp. 67, 68), to rule to show cause why a writ of mandamus should not issue, and for the following reasons:

1st. Said return and supplemental returns do not state facts sufficient to constitute an answer to the petition filed herein.

2d. Such return and supplemental returns are frivolous and insufficient. Wherefore, petitioner prays as in his petition.

Very respectfully,

JOHN H. MITCHELL,
Attorney for Petitioner.

Supreme Court of the United States.

October Term, 1888.

No. 5. Original.

Ex Parte: In the Matter of Hollon Parker, Petitioner.

Suggestions of error in the record of case Parker *v.* Dacres, incorporated in and made a part of the return of respondents.

It is evident the following portion of the printed record herein has no relevancy to this case, and should be eliminated in the consideration of this case, having evidently been incorporated inadvertently and by mistake. This doubtless will be conceded by counsel for respondent in their brief.

That is to say—

1st. All of page 10 of Record entitled "Transcript of Record," and also the first *four* lines of page 11 of same Record.

2d. All that portion comprising the first half of page 65, same record, being judgment entry in case of Hollon Parker *v.* George Dacres, No. 420, being proceedings of Tuesday, July 14th, 1885.

3d. Also all that portion or middle of page 66, same record, being opinion of Roger S. Greene, Chief Justice, in case entitled "Hollon Parker *v.* George Dacres, No. 420, opinion."

It seems the above portions of the record relate to a former appeal, a writ of error taken in this same case, and which appeal or writ was dismissed by the Supreme

Court because no assignment of error was properly made. No complaint is made herein of such dismissal, and the record thereof was, as it is believed will be conceded by counsel for respondent herein, inadvertently and improperly incorporated in this record, and should be eliminated in the consideration of this case.

JOHN H. MITCHELL,
Attorney for Petitioner.

IN THE

Supreme Court of the United States.

October Term 188[illegible] No. ——. Original.

EX-PARTE: IN THE MATTER OF THE PETITION OF HOLLON PARKER FOR WRIT OF MANDAMUS

vs.

THE SUPREME COURT OF THE TERRITORY OF WASHINGTON, THE HONORABLE RICHARD A. JONES, CHIEF JUSTICE, AND THE HONORABLES W. G. LANGFORD, FRANK ALLYN, AND LUCIUS B. NASH, ASSOCIATE JUSTICES THEREOF, Respondents.

To the Honorable the Supreme Court of the United States:

The petition of Hollon Parker respectfully shows to this Honorable Court:

First. That he is a citizen and resident of Walla Walla city, county of Walla Walla, and Territory of Washington.

Second. That on or about May 15th, 1884, your petitioner, Hollon Parker, as plaintiff, commenced a suit at law for the recovery of the possession of certain real property, and for twenty-two thousand five hundred ($22,500) dollars, against one George Dacres, in the District Court of the First Judicial District of Washington

Territory, holding terms at Walla Walla city, in and for the counties of Walla Walla and Franklin, in said Territory, and more particularly described in the complaint filed therein. And plaintiff alleged in said complaint that on the 28th day of December, A. D. 1874, he was, and ever since has been, the legal owner, and seized in fee of the said property; and that on said day the defendant unlawfully and wrongfully entered into possession of said premises, and has ever since unlawfully and wrongfully held possession of the same, to plaintiff's great damage, in the sum of twenty-two thousand five hundred ($22,500) dollars.

Third. That on the 12th day of November, 1884, defendant appeared and filed his answer to plaintiff's complaint, denying each and every allegation thereof, and alleging fee-simple title to said premises in defendant, under and by virtue of a judicial sale, foreclosing a mortgage, on the 4th day of August, 1874, on said premises, and further alleging that defendant has made permanent improvements on said premises to the value of six thousand ($6,000) dollars. That on the 15th day of November, 1884, plaintiff filed his reply to defendant's said answer, denying each and every allegation thereof. That upon the issues thus made upon said pleadings, and upon the 15th judicial day of said court, Wednesday, November 26th, 1887, a jury, under the instructions of the court, rendered a verdict in favor of defendant and against plaintiff. That upon said verdict and proceedings had, the court rendered the following judgment:

Twenty-sixth Judicial Day, Saturday, February 14th, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant.
} Judgment. 3959.

This action having been tried on the issue of facts formed herein, and the jury having found the following verdict, to wit:

"We, the jury empanelled in the above-entitled case, find that the plaintiff is not entitled to the possession of the property described in the complaint, and that the defendant is the owner in fee-simple of such premises and every part thereof (Nelson Snodgrass, foreman)—

Therefore, on motion of B. L. and J. L. Sharpstein, attorneys for defendant, it is considered and adjudged by the court that George Dacres, defendant, is the owner of the premises described in the complaint in this action, to wit:

The N. E. ¼ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ of Sec. No. 20, and the S. W. ¼ of Sec. No. 17, T. No. 7 north, range No. 36 east, in fee-simple title, and every part thereof; and it is further considered and adjudged that the defendant recover of the plaintiff the costs and disbursements of this action, taxed at $29.65, and that execution issue therefor.

(Signed) S. C. WINGARD,
Judge, &c.

That your petitioner, the plaintiff in said cause, Hollon Parker, thereafter, while the Honorable S. C. Wingard, the judge of said court, was in attendance at the July Term of the Supreme Court of Washington Territory begun and held at Olympia, Thurston county, Washington Territory, gave the following notice of appeal, and in pursuance of which the following order was then, July 27th, 1885, made in writing by said Judge Wingard, to wit:

At Chambers at Olympia, Thurston county, Washington Territory, July 27, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant.
} Notice of Appeal.

Comes now the above-named plaintiff, by his attorney, A. E. Isham, and gives notice at Chambers to the above-named defendant and his attorneys, and to the clerk of this court, and to all others, that he appeals this cause to the Supreme Court of this Territory by way of writ of error, and requests that this notice be entered of record upon the journal of this court, which is accordingly here now ordered by the court that said notice of appeal be entered of record on said journal, and said appeal is allowed.

Done at Chambers at Olympia, Thurston county, Washington Territory, this the 27th day of July, A. D. 1885.

S. C. WINGARD,
Judge, &c.

That thereupon, after the term in which said judgment had been rendered, and after said notice of appeal had been given and entered of record on said journal of said court, and said cause fully removed from the District Court of the First Judicial District of Washington Territory to the Supreme Court of said Territory, under and by virtue of an act of the Legislative Assembly of Washington Territory approved November 23d, 1883, entitled "An act in relation to the removal of causes to the Supreme Court," the defendant, George Dacres, appeared by his attorneys, B. L. and J. L. Sharpstein, at the next term of said District Court, after the judgment had been rendered and the notice of appeal had been given, and the time for appeal or taking out a writ of

error had fully expired, and the following proceedings were had, to wit:

In the District Court of the Territory of Washington and for the First Judicial District thereof, holding terms at Walla Walla for the counties of Walla Walla and Franklin, in said Territory.

Regular November Term 1885. First Judicial Day—Monday, November 9th, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant. } Order—No. 3959.

Now, on this day, this action coming on for a hearing on the motion of defendant to correct and modify the journal entry of what purports to be a notice of appeal given in the above-entitled action on July 27th, 1885, and it appearing to the court that copies of the motion and notice of the hearing thereof had been duly served on the attorney for the plaintiff more than three days prior hereto, and the defendant appearing by B. L. and J. L. Sharpstein, his attorneys, specially as stated in said motion and notice, and the court being fully advised in the premises, said motion is granted, and said journal entry amended by adding after the words "at Chambers" the words "at Olympia, Thurston county, Washington Territory, while in attendance upon the Supreme Court," and after the words "done at Chambers," and before the word "this," the words "at Olympia, in Thurston county, Washington Territory."

S. C. WINGARD,
Judge, &c.

The defendant in error, after appearing in the court below and making the above correction and amendments to the notice of appeal, appeared in the Supreme Court of said Territory in said cause on July 1st, 1886, by both general and special brief combined, and a

special motion, in which the defendant in error moved the court to dismiss the appeal for the following reasons:

1st. Because no notice of appeal was given or served in this action, or given in open court or Chambers within six months after the rendition of the judgment herein, or at any time.

Upon this motion the defendant in error raised and argued the single question of the right of Judge S. C. Wingard to order a notice of appeal to be spread upon the records of the First Judicial District while out of his district, and in attendance upon the Supreme Court at Olympia, Thurston county, Washington Territory.

No other objection was raised in the Supreme Court of Washington Territory, and no point was made in any form by defendant in error that he had not received three days' notice under section 2140 of the Code of Washington Territory.

If defendant in error was entitled to such notice, he had waived the same under Rule VI of the rules of the Supreme Court of Washington Territory, which is as follows:

All motions in the Supreme Court must be in writing, and filed with the clerk and served upon the adverse party or his attorney, unless service thereof be waived.

All motions for rule on the clerk to perfect transcripts, for leave to amend notices of appeal or writ of error, the proof of service thereof, or certificate of the clerk or judge to the transcript, or motion to dismiss a cause or affirm a judgment or decree without a hearing upon the merits, must be filed on or before the second day of the term, and not afterwards, unless by leave of the court the time be extended.

No time was extended by the court.

There is nothing in the records of the Supreme Court of Washington Territory to show that defendant in error did not have three days' notice in the court below of the

entry of the notice of appeal upon the journal of said court, and there is nothing in the record to show that defendant in error in any manner objected to the hearing of the case on its merits in the Supreme Court of Washington Territory, on the grounds that he had not received three days' notice. This cause was removed from the District Court to the Supreme Court solely and entirely under the act of 1883 heretofore referred to, the first section of which reads as follows:

SEC. 1. Be it enacted by the Legislative Assembly of Washington Territory, that any person desiring to remove a cause from any District Court of Washington Territory may do so, either in person or by his attorney of record, and in the following manner: *Such person or attorney may give notice in open court, or at Chambers, that he appeal such cause to the Supreme Court of the Territory; such notice shall, by order of the court or judge having* JURISDICTION *of the cause, be entered in the journal of such court, and no other service or notice shall be required;* and thereupon the clerk of such court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be filed with the clerk of the Supreme Court within the time allowed by law; and thereupon the Supreme Court shall have complete and perfect jurisdiction of such cause.

SEC. 2. That the Supreme Court shall hear and determine all causes removed thereto, in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities.

SEC. 5. The notice of appeal hereinbefore provided for may be given at any time within six months after the rendition of the judgment, order, or decision intended to be removed to the Supreme Court.

SEC. 6. All acts and parts of acts, so far as they conflict herewith, are hereby repealed.

Approved November 23d, 1883.

This act supersedes and repeals section 2140 of the Code of Washington Territory of 1881, in so far as it has

any relation to appeals or writs of error, which reads as follows:

SEC. 2140. When a party to an action has appeared in the same, he shall be entitled to at least three days' notice of any trial, hearing, motion, or application to be had or made therein before any judge at Chambers, which shall be in writing, setting forth the nature of the motion or application and the grounds thereof, and specifying the time and place where the same will be made, and which may be served on the adverse party or his attorney. * * *

Your petitioner further avers that said Code of 1881, sections 458 and 459, provide for the taking of an appeal or writ of error, and under said Code no provision is made for either of these proceedings at Chambers, and no three days' notice could be given or required under said Code; hence no such notice could even by implication be required to be given under the statute of 1883, such as is contemplated under section 2141 of said Code, by which section the Supreme Court of Washington Territory seek to deprive your petitioner of his right to have this cause heard in this Honorable Court. Said sections 458 and 459 provide for their own notice of appeal, independent of section 2140, which has no relation to appeals or writs of error. They are as follows:

SEC. 458. An appeal or writ of error is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney. Every notice of appeal or writ of error must be signed by the party taking the same, or his attorney of record, and must contain the title of the District Court in which the proceedings sought to be reviewed were had; the title of the cause as in the District Court; a particular description of the judgment, decree, or order sought to be reviewed; and, in case of appeal, a particular description of every decision, ruling,

order, or decree by which the appellant claims to have been aggrieved, and which he relies upon as ground for a reversal or modification of the judgment, order, or decree; and, in case of a writ of error, a particular description of the errors assigned.

SEC. 459. An appeal shall not be perfected until the notice thereof has been served upon the adverse party, or his attorney of record. Upon payment of his fees, the clerk shall forthwith transmit by mail, express, or messenger—not a party nor the attorney of a party—a transcript of the record in the cause, or so much thereof as the appellant or plaintiff in error, in writing, in the notice as directed, to which shall be appended copies of the notice of appeal and the supersedeas bond, if any.

Your petitioner further avers that Rule XI of the then existing rules of said Supreme Court reads as follows:

XI.

Technical Objections to Hearing on Merits.

Exceptions or objections to transcript, bond, notice of appeal, or writ of error, or the service thereof, or to writs of error, or the return thereof, and all technical exceptions or objections to record tending to prevent the hearing of a cause upon merits, must be taken and *plainly stated* in the printed briefs of appellees, or defendants in error, or the same will not be regarded; and, so taken and *specified*, appellants and plaintiffs in error must present and file, on or before the second day of the term, such additional or amended record, certificate, or other matter, if any such there be, as shall be required to remove or answer the exception or objection so taken, unless further time be granted by the court for cause shown.

No further time was granted by the court.

That, notwithstanding said statute of 1883, and the rules of the Supreme Court, your petitioner avers that said Supreme Court of Washington Territory did un-

lawfully and wrongfully, on the 5th day of January, 1887, dismiss said cause on the following grounds:

In the Supreme Court of Washington Territory, January Term A. D. 1887—Case No. 474.

HOLLON PARKER, Plaintiff in Error,
vs.
GEORGE DACRES, Defendant in Error.

Opinion.

This motion to dismiss must be granted, because the notice of appeal not being one given in open court, and being in its nature an application for an order allowing the appeal, was entered by the judge without the preliminary notice to the adverse party prescribed by section 2140 of the Code.

ROGER S. GREEN,
Chief Justice.

To all of which rulings the plaintiff in error then and there excepted, and the exception was allowed; and on the 5th day of January, 1887, said Supreme Court entered judgment in said cause dismissing said appeal (by way of writ of error), and for costs against your petitioner as plaintiff in error therein, of which judgment entry the following is a true and correct copy:

In the Supreme Court of Washington Territory, January Term 1887—Third day, January 5, 1887.

HOLLON PARKER
vs.
GEORGE DACRES. } Judgment—No. 474.

This cause having been heretofore submitted to the court upon the motion of defendant in error to dismiss the appeal from the judgment of the District Court of the First Judicial District of Washington Territory holding terms at Walla Walla, and upon the argument of coun-

sel, and the court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 5th day of January, A. D. 1887, on motion of B. L. and J. L. Sharpstein, Esqrs., of counsel for defendant in error, considered, adjudged, and decreed that the appeal from the judgment of the said District Court be, and the same is hereby, dismissed with costs, and that the said George Dacres recover of and from the said Hollon Parker the costs of this action, taxed and allowed at dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said District Court for further proceeding.

That thereupon your petitioner filed in said Supreme Court, on the 11th day of January, 1887, a petition for a rehearing before the close of the term at which said decision was made dismissing said appeal.

The following is a true and correct copy of the motion for a rehearing:

In the Supreme Court of Washington Territory, January Term 1887.

HOLLON PARKER, Plaintiff in Error,
vs.
GEORGE DACRES, Defendant in Error.

Petition for Rehearing on Motion.

Now comes the plaintiff in error, and petitions the court for a rehearing in the above-entitled cause on the following grounds, to wit:

First. That the point upon which this case was dismissed was not raised in defendant in error's brief or included in his motion for dismissal, and, according to Rule XI, has been by him waived, and his appearance in the Supreme Court for any purpose was a general appearance and waiver of the point upon which the court dismissed this cause. The point, and only point, raised in argument by attorneys for defendant in error, or argued by plaintiff in error, was the question of the judge's right to cause a journal entry to be made when

the judge was outside of his district and no objections were "taken and plainly stated" in the printed brief of defendant in error, on the grounds that defendant in error had not received notice of the proceedings at Chambers under section 2140 of the Code.

Second. The defendant (attorney) in error appeared in the court below, and moved for an amendment, in open court, of the journal entry, giving the notice of appeal; and although the appearance may have been special for the purpose of amending the journal record, yet, so far as the regularity of the giving of the notice of appeal is concerned, such appearance was a waiver.

Third. Section 2140 of the Code does not apply to notices of appeal at Chambers. Such notices are *ex parte*, in the form of an order to be spread upon the journal. Under section 1, page 59, Statutes 1883, "no other service or notice of process shall be required" other than the journal entry.

There is nothing in the record to show whether the defendant in error did or did not have three days' notice of the proceedings at Chambers, and the presumption is that all things were done that should have been done prior to the signing of the order by the judge below. This court cannot presume that the court below committed error, or proceeded irregularly without such error or irregularity, is plainly shown by the transcript, and in some manner assigned as error in this court. (2 Wash. Ter. Rep., p. 472.)

Fifth. We contend that, so far as notice of appeal given at Chambers under the Statutes of 1883 is concerned, it supersedes and repeals section 2140 of the Code, because no service of the notice is required at Chambers or in open court.

A. E. ISHAM,
Attorney for Plaintiff in Error.

Which above petition for rehearing was overruled by the court, and the ruling excepted to by the plaintiff in error, and the exception allowed.

That said petition was filed under and by virtue of the laws of Washington Territory and Rule XIV of the Supreme Court of the Territory, which is as follows:

XIV.

Filing Petition for Rehearing.

Every petition for a rehearing must be filed before the close of the term at which the decision is made; and no more than one petition for a rehearing of the same question shall be filed; provided that the court may, in its discretion, allow any petition to be amended.

Your petitioner further avers that section 483 of the Code of Washington Territory provides as follows:

SEC. 483. The petition for rehearing shall be the argument of the applicant therefor; and if the court thinks that such argument requires a reply, it shall so indicate to the other party, and he may make reply within such time as said court shall allow; and with a view to a rehearing, the court may extend the suspension of proceeding yet further if need be.

Petitioner further avers that there is, as he is advised by his counsel, and as he verily believes, substantial error in the proceedings in said cause, and in the judgment therein in the District Court, and also in the decision of said Supreme Court dismissing said appeal by way of writ of error, whereby the substantial rights of this petitioner as plaintiff in error therein were and are materially and adversely affected, and if said judgment is permitted to become final, as against this petitioner, and as plaintiff in error therein, an irreparable injury and injustice will be done him; and your petitioner further states that he is entirely without remedy in the premises unless it is conferred by the interposition of this Honorable Court. Nor is this application either for annoyance or delay, but that petitioner's rights may be protected, errors in said cause by said Supreme and District Courts corrected, and justice done him in the premises. That the amount in controversy in said

cause is largely in excess of five thousand dollars, exclusive of costs.

Wherefore petitioner prays that a peremptory writ of mandamus may issue herein, directed to the said Supreme Court of Washington Territory, and to the honorable the judges thereof, Richard A. Jones, chief justice, and W. G. Langford, Frank Allyn, and Lucius B. Nash, associate justices, commanding and enjoining them to set aside the order and judgment of said Supreme Court made and entered in said cause on the 5th day of January, A. D. 1887, as aforesaid, dismissing said appeal by way of writ of error and rendering judgment against this petitioner, as plaintiff in error therein, for costs, and to reinstate said cause in said Supreme Court, and hear and decide the same on its merits, and for such other and further relief as petitioner may be entitled to by virtue of the premises, and for his reasonable costs and disbursements herein; and as in duty bound your petitioner will ever pray.

JOHN H. MITCHELL,
Attorney for Petitioner.

Yakima

WASHINGTON TERRITORY, } ss:
County of ~~Walla Walla~~,

I, Hollon Parker, petitioner, being first duly sworn, say the foregoing petition is true, as I verily believe.

(sgd) Hollon Parker

Subscribed and sworn to this 3rd day of May, 1888. before me, Clerk of the District Court for the 4th Judicial District of Washington.

(sgd) A. A. Clement
By Wm. F. Prosser

Seal

JAMES H. McKENN

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

Ex parte HOLLON PARKER.

In the matter of the Petition of HOLLON PARKER for Writ of Mandamus,

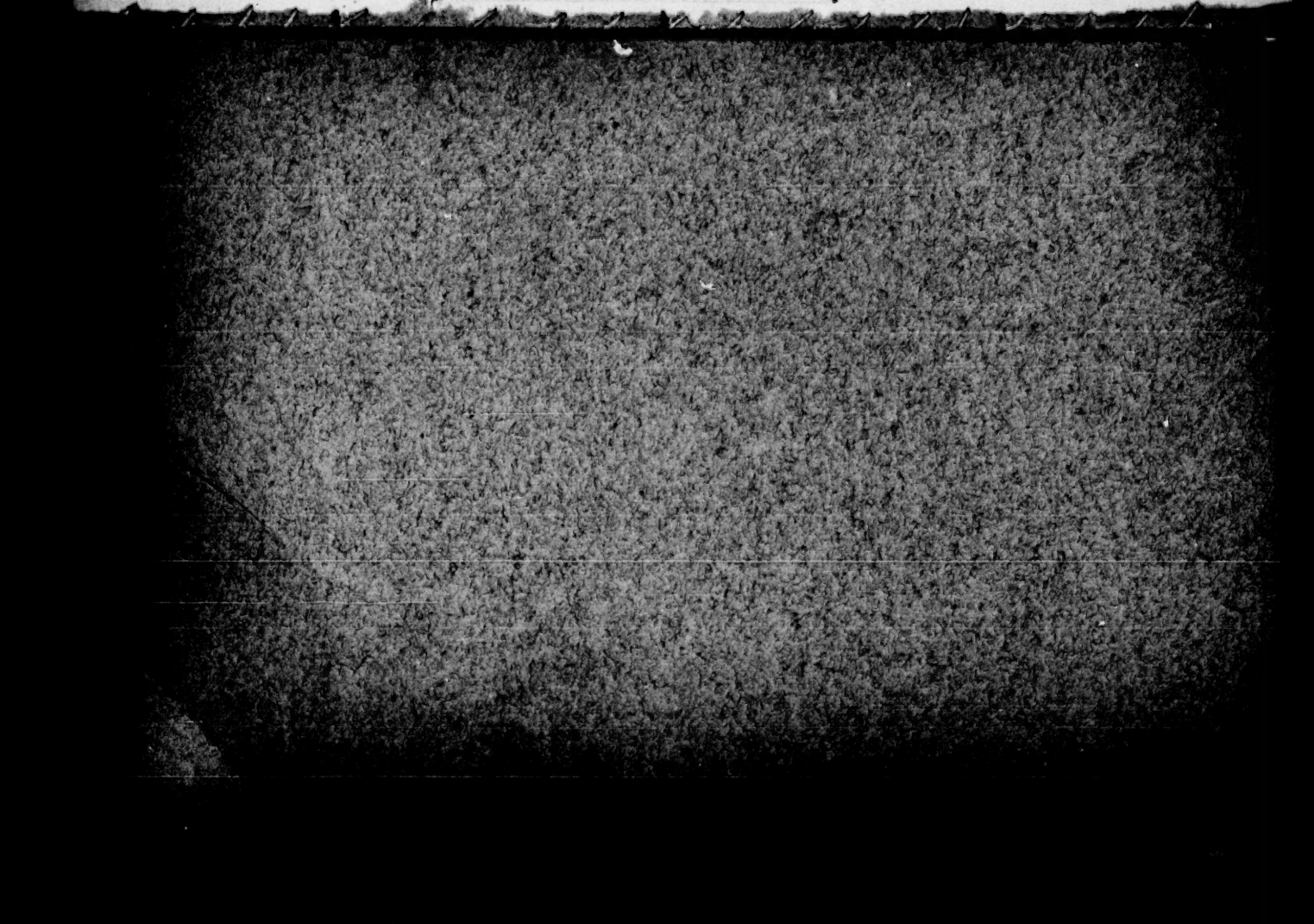
vs.

The SUPREME COURT OF THE TERRITORY OF WASHINGTON, the Hon. RICHARD A. JONES, Chief Justice, and the Hon. W. G. LANGFORD, FRANK ALLYN, and LUCIUS B. NASH, Associate Justices thereof, *Respondents.*

Brief of Respondents.

W. W. UPTON & C. B. UPTON,
JOHN B. ALLEN,
B. L. & J. L. SHARPSTEIN,
Attorneys for Respondents.

W. H. Moore, Print., 511 Eleventh St., Northwest.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

In the matter of the Petition of HOLLON PARKER for Writ of Mandamus,

vs.

The SUPREME COURT OF THE TERRITORY OF WASHINGTON, the Hon. RICHARD A. JONES, Chief Justice, and the Hon. W. G. LANGFORD, FRANK ALLYN, and LUCIUS B. NASH, Associate Justices thereof, *Respondents.*

Brief of Respondents.

I.

The above respondents submit the following points to the consideration of the Court, as bearing upon the question whether a peremptory mandamus should issue herein:

1. Mr. Justice Langford not having acted as a member of the supreme court of Washington Territory when any action or proceeding was had or taken relative to the said case of Parker *vs.* Dacres, and the other respondents not then being members of that court, it is apparent that these respondents have not been requested to take jurisdiction of the case, and that no one of them has ever personally refused or declined to act in relation thereto.

2. The final decision of the territorial supreme court, denying a rehearing and affirming the dismissal of the

appeal having been made January 17th, 1887, the Petitioner having delayed some twenty-one months to apply for mandamus, and the changes in the personnel of the court having taken place unavoidably and not altogether unexpectedly during this delay, it is submitted whether, even if mandamus were in other respects the appropriate remedy, the petitioner would not be barred by his non-action.

3. It is submitted whether the attempt to appeal the cause to the territorial supreme court, which was commenced July 27th, 1885, was such compliance with the statutes as to give that court jurisdiction to review the judgment of the district court.

4. Whether it does not appear affirmatively by the record that the petitioner is without title to the land, that upon a retrial of the action in ejectment he could not possibly be entitled to recover, and that the errors assigned do not affect a substantial right of the petitioner.

5. And respondents also submit whether mandamus is an appropriate mode of reviewing a judgment from which an appeal lies to this court, and which was deliberately rendered by a tribunal charged with the duty of deciding the disputed question of law upon which the correctness of the judgment dismissing the appeal depends.

II.

It is thought by counsel for the respondents that the case can be more briefly presented by first referring to the third of the above propositions, namely, the sufficiency of the attempted appeal of the case of *Parker* vs. *Dacres* to the territorial supreme court.

III

STATEMENT OF THE CASE OF PARKER VS. DACRES.

That case was a possessory action in the nature of ejectment, tried in Walla Walla county, in the first judicial

district. On the trial in the district court the jury was instructed to find for the defendant, and a verdict being rendered, judgment was entered February 14th, 1885, in favor of the defendant. In February, 1885, the plaintiff Parker, attempted an appeal to the territorial supreme court, and on July 14th, 1885, that appeal was dismissed, upon the ground, among others, that no assignment of errors had been filed, as required by the rules of the court. (See Return, pp. 10 and 65.)

The dismissal of that attempted appeal was not then, and is not now, complained of by the petitioner; it is not mentioned in the petition. But the six months allowed for taking an appeal, extending to August 14th, 1885, not having then expired, the plaintiff Parker, attempted a second appeal, and for that purpose, on July 27th, 1885, at Olympia, Thurston county, in the second judicial district, he, by his attorney, applied to Justice Wingard, before whom the cause had been tried in Walla Walla county, presenting to Justice Wingard the so-called chambers' order, which is substantially set forth in the petition for mandamus on page 4, and is there called a notice of appeal. Justice Wingard, although absent from his judicial district, signed the order at Olympia, as requested by the plaintiff's attorney.

This proceeding was had without notice to the defendant Dacres. The record and the petition for mandamus are silent as to how this order was transmitted to Walla Walla county, as to when it arrived there, and as to when it came to the knowledge of Dacres. Under the act of 1883, filing assignment of errors is not a step in taking appeal.

The record does not disclose that any further action was taken in the cause by either party until the following November, nor does it appear whether the defendant Dacres had any information on the subject until that time. The petition for mandamus, by its silence on the point, tacitly admits that no further steps were taken in the attempted appeal until November, 1885. (See Petition, pp. 4 and 5.)

The original order did not show on its face in what county it was made, but on November 9, 1885, it was amended by inserting the words "at Olympia, Thurston county, Washington Territory," (see Return, pp. 1 and 61,) and as amended the order reads as follows: (see Petition, p. 4, and Return, p. 27.)

"At chambers, (at Olympia, Thurston county, Washington Territory,) July 27, 1885.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, Defendant. } No. 3959. Notice of Appeal.

Comes now the above-named plaintiff, by his attorney, A. E. Isham, and gives notice at chambers and to the clerk of this court and to all others that he appeals this cause to the supreme court of this Territory by way of writ of error, and requests that this notice be entered of record upon the journal of this court, which is accordingly here now ordered by the court that said notice of appeal be entered of record on said journal, and said appeal is allowed.

Done at chambers, (at Olympia, Thurston county, Washington, Territory,) this 27th day of July, A. D. 1885.

S. C. WINGARD, *Judge, &c.*"

IV.

The enactments providing the modes of taking appeals to the supreme court of Washington Territory are contained in the Code of 1881, and in the act of November 23rd, 1883.

Those contained in the Code of 1881 of Washington Territory are as follows:

"SEC. 453. Appeals and writs of error from the district court may be taken to the supreme court at any time within six months from the rendition of the judgment, or order appealed from or complained of, and not afterwards.

* * * * * * * *

"SEC. 458. An appeal or writ of error is taken by filing with the clerk of the court in which the judgment or order

appealed from is entered a notice stating the appeal from the same or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney. Every notice of appeal or writ of error must be signed by the party taking the same or his attorney of record, and must contain the title of the district court in which the proceedings sought to be reviewed were had; the title of the cause as in the district court; a particular description of the judgment, decree, or order sought to be reviewed; and in case of appeal, a particular description of every decision, ruling, order, or decree by which the appellant claims to have been aggrieved, and which he relies upon as ground for reversal or modification of the judgment, order, or decree; and in case of a writ of error, a particular description of the errors assigned.

"SEC. 459. An appeal shall not be perfected until a notice thereof has been served upon the adverse party or his attorney of record. Upon payment of his fees, the clerk shall forthwith transmit by mail, express, or messenger, not a party nor the attorney of a party, a transcript of the record in the cause, or so much thereof as the appellant or plaintiff in error, in writing, in the notice has directed, to which shall be appended copies of the notice of appeal and the supersedeas bond, if any."

The code of 1881 also contains the following sections, increasing largely the kinds and classes of business to be transacted at chambers, and providing that notice shall be given when business is to be transacted at chambers:

"SEC. 2138. The several judges of the district courts in this Territory, and each of them *in their respective districts*, may at chambers, in vacation, entertain, try, hear, and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury, and all orders, rulings, judgments, and decrees, made or rendered by a judge of the district court at chambers, may be entered of record in vacation, and shall have like force and effect as though made or rendered at a regular term of the district court.

"SEC. 2140. When a party to an action has appeared in the same, he shall be entitled to at least three days' notice of any trial, hearing, motion, or application to be had or made therein, before any judge at chambers, which shall be in writing, setting forth the nature of the motion or ap-

plication and the grounds thereof, and specifying the time and place where the same will be made, and which may be served on the adverse party or his attorney."

These two sections and their relation to each other are deemed worthy of special examination, in the present case, because it is claimed in the petition that the notice required by the latter section is inconsistent with the act of 1883, providing a mode of taking appeal, and is, therefore, repealed or so modified that, by the act of 1883, an appeal may be taken at chambers in any part of the Territory without any notice to the adverse party.

The act of November 23rd, 1883, provides as follows:

"SECTION 1. *Be it enacted by the Legislative Assembly of Washington Territory*, That any person desiring to remove any cause from any district court of Washington Territory may do so, either in person or by his attorney of record, and in the following manner: Such person or attorney may give notice in open court or at chambers that he appeals such cause to the supreme court of the Territory; such notice shall, by order of the court or judge having jurisdiction of the cause, be entered in the journal of such court, and no other service or notice shall be required; and thereupon the clerk of such court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be filed with the clerk of the supreme court, within the time allowed by law, and thereupon the supreme court shall have complete and perfect jurisdiction of such cause.

"SEC. 2. That the supreme court shall hear and determine all causes removed thereto, in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities.

* * * * * * * *

"SEC. 5. The notice of appeal hereinbefore provided for may be given at any time within six months after the rendition of the judgment, order, or decision intended to be removed to the supreme court.

"SEC. 6. All acts and parts of acts, so far as they conflict herewith, are hereby repealed."

V.

The repealing clause of this act of 1883 is express and definite, and it only repeals such prior legislation as is in conflict with the act. Up to this time the supreme court of the Territory has held that the above section, 2140, requiring notice of the time and place of transacting business at chambers, is not in conflict with the act of 1883. (Melville *et al. vs.* Chehalis Co., 3 Wash. T., 14; Beemer *vs.* Boyer, 5 West Coast Rep., 571.)

The act of 1883 gives a new and cumulative mode of appeal, which dispenses with all details, except notice; but it keeps in view the important feature of notice to the adverse party. It is an ancient theory of the law, that all parties who have appeared are presumed to be present in open court, and as the law stood at the time the legislature had the act of 1883 under consideration, nearly all the business of the court could be transacted at chambers by virtue of sections 2138 and 2140; and in pursuance of those sections, all parties were to be served with the three days' notice of chambers' business, and being so served, they were to be treated as being present as well at chambers as in open court.

Under that state of the law when a case was properly brought before the judge at chambers, by the prescribed notice, an appeal could be taken as effectually at chambers as in open court. It is significant that the addition made to chambers business in 1881, by section 2138, necessitated the requirement of notice which is contained in section 2140, and that the above act of 1883 makes a like addition to chambers business, adding a class of business the main purpose of which is notice to the adverse party. It is submitted whether it would not be entirely inconsistent with the spirit and intent, and with the rational operation of the act of 1883, to treat section 2140 as repealed; or for the Legislature to have permitted it to be repealed, without

making an additional provision for notice in the act of 1883. Such course would have dispensed with the only important feature and purpose of the act of 1883, that is, notice to the adverse party.

VI.

Before referring to the question of the power of a district judge to transact chambers business outside the limits of his district, it is desired to submit to the court whether the so-called order or notice of appeal, made at Olympia, is sufficiently specific to identify any certain cause of action or to be regarded as a notice pertaining to the cause commenced in Walla Walla county, even if the paper was without other fault and had been exhibited to the defendant.

It speaks of a cause which has the same title as the action of ejectment which originated in Walla Walla county, but it does not purport to identify the cause; it gives no means of ascertaining where or in what court the cause was commenced or tried or the judgment rendered, nor does it state anything except the names of the parties tending to identify it. It mentions the supreme court of the Territory, but is silent as to the court, the county, or the district to which the cause pertained, and it does not even show that it refers to a cause commenced in a district court.

In addition to this uncertainty, the place of making the so-called chambers order indicates a case in the second judicial district and in Thurston county, and this indication is made stronger by the fact that the paper purports to give present notice at the time and place where it is being made, although, under the act of 1883, such paper, when duly made, does not become notice until entered on the journal of the court. The paper also imports that the judge *then* allowed the appeal, implying that the appeal was already perfected and that the journal entry was *then* made in Thurston county.

Also in this paper the plaintiff's attorney "requests that this notice be entered on the record of *this* court," without specifying what court and without indicating any county other than Thurston county, where the order was being made. It is submitted that the paper is too indefinite to identify a particular cause.

VII.

As to the question of the authority of a district judge to transact chambers business beyond the limits of his district, it is submitted, not only that the territorial courts are created by statute with limited jurisdictions, and cannot take power by implication, but also that the statutes creating the district courts of Washington Territory and prescribing their powers are conclusive that a justice cannot act as district judge in that Territory, either in open court or at chambers, except in the district to which he is assigned.

Section 1907 of the Revised Statutes of the United States provides that the judicial power in the Territories, including Washington, "shall be vested in a supreme court, district courts, probate courts, and justices of the peace."

Section 1865, R. S., provides that the Territory shall be divided into judicial districts, "and a district court shall be held in each district of the Territory by one of the justices of the supreme court, at such time and place as may be prescribed by law, and each judge, after assignment, shall reside in the district to which he is assigned."

By section 1874, R. S., "the judges of the supreme court of each Territory are authorized to hold court within their respective districts, in the counties wherein courts have been or may be established."

And the above-quoted section 2138, of the code of 1881, which points out what business may be done at chambers, carefully observes and re-enacts these limitations of the powers of district judges to their respective district, as pre-

scribed by Congress, and it expressly provides that in chambers business the powers of the judges shall be exercised by "each of them *in their respective districts.*"

By the above statutes the functions of a district judge are distinct from his functions and powers as a justice of the supreme court. As a district judge he becomes vested with power to act in his district only at the time of his assignment thereto; he is required to reside therein and has no authority to act as district judge except within the limits of his judicial district; there is no mingling of his powers as district judge with the powers he may exercise as a member of the appellate court; these powers are as distinct as though vested in different persons; they are made so by the Federal statute, and section 2138 of the Code of 1881, not only recognized the limitation, but in express terms applies it to chambers business. This territorial limit of power is in entire accord with what has been recognized elsewhere, and where such limitation has been so prescribed courts have regarded it as imperative. In People *vs.* Judges of Montgomery Co., 18 Wend., 649, the features of the case were similar to the one at bar. A county judge while at Albany and sitting as a member of the appellate court ordered the allowance of an appeal in a case from his proper district, and the appeal being afterward dismissed a mandamus was prayed to reinstate the appeal, but the writ was refused by the general term because the appeal, though regular in other respects, was allowed by the judge when out of his district. The court said: "it was a judicial act which could only be properly performed in his own county.

Earles *vs.* Earles, 27 Kans., 542.

Packard *vs.* Packard, 34 Kans., 53.

It is clear that an attempt to take an appeal or transact other business at chambers outside the proper district is without authority and void, and that the proceeding is in law in all respects as if not attempted.

VIII.

The petition (pages 6 and 7) avers that there is nothing in the record "to show that the defendant in error did not have three days' notice." This point is not well taken. Any notice required by law to constitute an appeal is a jurisdictional fact which must appear affirmatively by the record, and in a court of limited jurisdiction created by statute, failure of the record to show such jurisdictional fact is of itself want of jurisdiction of the subject-matter.

The assumption in the petition (pages 5 and 6) that "the defendant Dacres waived notice of appeal by his appearance in the cause," is without foundation, and is contradicted by both the return of the respondents and by the record of the case of Parker *vs.* Dacres. The record shows that in each motion and appearance of the defendant, whether in relation to the appeal first attempted or to the one mentioned in the petition, the defendant gave distinct, written notice of the limited nature and special purpose of his appearance, in accordance with Rule XVII of the court, which is as follows:

"RULE XVII. *Special Appearances.*

"Any party to a cause pending in the supreme court who shall, in person or by attorney, file a brief or any paper, or shall receipt for papers filed in a cause, without *at the same time* affirmatively, by written notice to the opposite party *or* the court, make a limited or special appearance in the cause, shall be held to have entered a general appearance in the supreme court, and to have waived all objections to the jurisdictional process."

For defendant's appearance in relation to the appeal first attempted, see return, pages 10 and 11; for his appearance in relation to the attempted appeal now under consideration, see pages 1, 14, 62, and 63. Each of these contain the written notice specified in Rule XVII of the court, and shows that the defendant made a special and limited appearance as contemplated by the rule.

The motion in support of which the defendant's brief was presented is as follows:

"The defendant in error appearing specially for the purpose of this motion only, moves the court to dismiss the appeal herein for the following reason:

"Because no notice of appeal was given or served in this action, or given in open court or at chambers, within six months after the rendition of judgment herein, or at any time." (See Return, p. 62.)

In the brief, notice of the special and limited nature of the defendant's appearance is twice given. (See Return, pp. 14 and 15.)

The question raised by the motion was whether the cause had been brought within the jurisdiction of the court. Any notice or other proceedings that do not, in accordance with the statute, constitute an appeal, do not amount to a "notice of appeal," and hence there is no occasion for the statement in the petition, page 7, that the defendant did not object "on the grounds that he had not received three days' notice."

The question raised by the motion being a question to the jurisdiction, was one that can be raised without previous notice whenever the parties are before the court.

On the argument and in the brief it was claimed that the statutes on the subject of appeals had not been complied with; that the proceeding at Olympia was not a proceeding "at chambers;" that the court had not acquired jurisdiction either of the person or of the subject-matter; in other words, that the case of Parker *vs.* Dacres had not been appealed, and for that reason was not "pending in the supréme court."

The objection to the jurisdiction and the special and limited nature of the appearance being distinctly stated, it is submitted that neither under the above rule nor under the common law could such an appearance be construed or held to be a waiver of want of jurisdiction of the person

or of the subject-matter, or held to confer jurisdiction of an appeal that had not been regularly taken. When a question of jurisdiction of the subject-matter is raised and is well founded, the proceeding is, as matter of law, terminated, and nothing but the dismissal of the cause can lawfully take place. (Harkness *vs.* Hyde, 98 U. S., 476.)

There is a marked difference between waiver of jurisdiction of the person and conferring jurisdiction of a subject-matter, but the limited appearance under the rule waived neither.

If it is true, as a matter of law, that the paper made at Olympia was, by its terms insufficient, or that the judge of the first district lacked authority to act at chambers in the second district, or that for any other reason an appeal had not been taken, the presentation of the objection to the jurisdiction made it the duty of the court to dismiss the proceeding, as was done.

IX.

When it appears by the record that the moving party cannot be entitled to recover under any course that may be pursued, that is ground for dismissing the proceeding, whether in a court of original or appellate jurisdiction, and in such case the appellate court will not determine whether error was committed, but will dismiss the cause.

Bank *vs* Bank, 21 Wall., 294.
Campbell *vs.* Pratt, 2 Pet., 354.
Robst *vs.* Brock, 10 Wall., 517.

When this is disclosed by the record the point may be presented without previous notice at any stage of the proceeding in which the parties are before the court and the case is under consideration, and the presentation of this point in a brief in connection with the motion to dismiss for want of jurisdiction could not be construed to confer jurisdiction or to be a waiver of want of jurisdiction of

the subject-matter, even if the special notice of the appearance had not been mentioned, yet out of abundant caution every paper presented by the defendant's counsel gives written notice of the special and limited nature of the appearance.

X.

The fourth point suggested above by the respondents is based on the familiar rule set forth in the cases last cited, namely, that a court will not send a case back for a new trial "if it be certain that the plaintiff cannot recover in the action."

It is submitted that the record renders this point absolutely certain.

In the action of ejectment each party claimed title through one Edward Shiel; the defendant claiming under a judicial sale made to him on August 4, 1887, under a foreclosure proceeding entitled Almas H. Reynolds *vs.* Edward Shiel, and the plaintiff claimed as grantee of Shiel through conveyances admitted to be subsequent to the foreclosure proceeding and to the sale to the defendant; and the plaintiff relies entirely upon a collateral attack on the foreclosure proceeding against which he makes but two objections that are even colorable or plausable. These are (1) an objection to the form of the sheriff's return of service of original process; and (2) that the sale of the mortgaged premises and the return of that sale to the court were made by "B. W. Griffin, sheriff, by F. Kimberly, deputy," (see Return, p. 53,) the plaintiff claiming that it should have been made by the sheriff without the intervention of the deputy, for the reason that the order of sale (Return, p. 51,) directed the sale to be made by the sheriff and appointed him special master for that purpose. The latter objection is not available as a ground of collateral attack, because the sale being made and returned to the court August 4, 1874, the court, on September 14, 1874,

(Return, p. 56,) confirmed the sale and ordered the sheriff to make a deed to the purchaser. The confirmation cured all defects, if any there were, as to the mode of sale.

In the foreclosure the court was proceeding under the Code of Washington Territory of 1873, which provides, in subdivision 4, of section 361, as follows:

"An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale as to all persons in any other actions."

The order of confirmation, of date September 14, 1874, (Return, p. 65,) is in due form, and contains the following:

"This action comes on for hearing on motion to confirm the sale of real estate heretofore made in this action by the sheriff of Walla Walla county, and no objection to said sale having been filed herein, and the time allowed by law for filing the same having fully expired, and it appearing to the court that said sale and all proceedings relating thereto were regular and according to the laws of Washington Territory and the course and practice of this court; therefore, on motion of B. L. Sharpstein, Esq., attorney for plaintiff, it is ordered that said sale and all proceedings in relation thereto be, and the same are, in all respects confirmed, and the sheriff is ordered to make a deed to the purchaser according to law.

J. R. LEWIS, *Judge*."

Voorhees *et al. vs.* Jackson *et al.*, 10 Pet., 449.
Doolittle *vs.* Bryan, 14 How., 563.
Hermon on Executions, p. 434, Sec. 261.
Freeman on Judgments, Secs. 126 to 130.

In the above objection to the sheriff's return of service it is not assumed or pretended that the defendant was not in fact served with original process; the point of the objection is that the return which certifies service on Edward Shiel does not denominate him "defendant," and that the record is therefore imperfect. This alleged defect, if it can be called a defect, is also cured by the record. If it were

the case that the defendant was not served, a bill would lie to set aside the judgment as false, for the record clearly states that the service was upon the defendant, Edward Shiel.

The return is indorsed upon the original subpœna, which is in due form, and contains the title, (Return, p. 43,) and entitles the cause, "Almas H. Reynolds, plaintiff, *vs.* Edward Shiel, defendant."

The return thus indorsed (p. 43) is as follows:

"TERRITORY OF WASHINGTON, } ss:
County of Walla Walla. }

I hereby certify that I have served the within subpœna and bill in equity on Edward Sheil by delivering to him personally a certified copy thereof in said county and Territory on the 9th day of July, A. D. 1873. Certified by Wm. H. Andrews, clerk, to be a true copy.

B. W. GRIFFIN, *Sheriff*,
By F. KIMBERLY, *Deputy*."

If under this return there could have been any doubt as to the identity of the party served, the point is not now material, it being settled by the court and the identity of the party having become a matter of record in the cause. The proof of service appears in the order referring the cause to a master, (Return, p. 48,) which shows that the subpœna and bill of complaint were personally served on the defendant. Such an order, as well as the original process and return of service, is a part of the judgment roll, and is of the same effect in proof of service as would have been an amended return.

If the omission was a defect which might have been worthy of consideration, had it not been cured, it was a mere verbal defect curable by amendment of the return, a matter resting in the discretion of the court. The record proof that the service was on the defendant, Edward Shiel, contained in the order referring the cause to a master, is as effective as would have been an amendment of the return.

It is a part of the record which cannot be attacked collatterably, and which cures the alleged defect in the return.

Hollingsworth *vs.* Barbour, 4 Pet., 466.
Hall *vs.* Williams, 6 Pick., 232.
Alderson *vs.* Bier, 9 Cal., 320.
Landers *vs.* George, 59 Ind., 309.
Shumway *vs.* Stillman, 6 Wend., 447.

XI.

CHANGE OF THE PERSONEL OF THE COURT.

When on Jan. 17th, 1887, the supreme court of Washington Territory made the final order in the case of Parker *vs.* Dacres, it was composed of Chief Justice Green and Associate Justices Hoyt, Turner, and Langford, and as stated in the return, the latter had taken no part in that case. On October 29th, 1888, when the alternative writ was awarded, none of the justices who had taken part in the case were members of the court.

It follows that none of the respondents have refused, or can be charged with having refused, to perform the acts which the petitioner charges as their duty.

In the United States *vs.* Boutwell, 17 Wall., 604, it is laid down by this court, that the office of a writ of mandamus is to compel the performance of a duty resting upon a person to whom the writ is sent. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person. The writ does not reach the office.

It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that previous to making application for a writ to command the performance of

any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred.

In this connection it is to be observed that even if a case of hardship could change the rule of law, the petitioner is not in condition to complain, either of the above rule in relation to mandamus or of the rule that required him to give three days' notice if he desired to proceed at chambers in his intended appeal. In the latter proceeding he had eighteen days, which was sufficient time to have served his notice of appeal in accordance with the Code of 1881, without application to a district judge, and in his pending application he permitted twenty-one months to elapse before presenting his petition for mandamus. The delay was his own, and he has permitted the unavoidable change in the personel of the court to intervene. It is by his inaction that this rule of law has become applicable to the case.

XII.

Is this a case where mandamus is the appropriate remedy?

It differs from *ex parte* Parker, (120 U. S., 737,) the only case in which it is claimed the court has departed from the rule laid down in *U. S.* vs. *Lawrence*, (3 Dallas, 42.) In the present case the territorial supreme court has acted judicially; in rendering its judgment of dismissal it necessarily decided a question of law which it was in duty bound to decide, and which was of such importance that to have decided it differently would have overruled what had become the settled practice of that court; but in the former case the opinion indicates that it was considered by this court that no judicial action had been taken, and that it appeared with certainty in the record that the appeal had been regularly taken.

In almost one hundred years this court has heard or reviewed eighty-seven petitions for mandamus to be directed to a court, and it is believed the writ has been allowed in only nine of these cases. An examination of these cases will show that in U. S. *vs.* Peters, 5 Cranch, 115, *Ex parte* Bradstreet, 32 U. S., 634, and N. Y. Life Ins. Co. *vs.* Wilson, 33 U. S., 294, the writ was awarded in aid of the appellate jurisdiction of this court.

In *ex parte* Bradley, 7 Wall., 364, and *ex parte* Robinson, 86 U. S., 511, the writ was awarded to compel the restoration of an attorney after disbarment.

In *ex parte* Morris, 9 Wall. 605, and *In re* U. S., 83 U. S., 699, the applications (amicable in form) were made with consent of the inferior court.

In Virginia *vs.* Rivers, 100 U. S., 313, the application was to compel execution of a writ of *habeas corpus*, which had been awarded. The only claimed exception to the rule is the above case, *ex parte* Parker, (120 U. S., 738,) it being the only case where a mandamus has been awarded by this court to compel the reinstatement of an appeal which had been dismissed; and difficult as it is to reconcile that case with *ex parte* Morgan, 114 U. S., 147, and *ex parte* Brown, 116 U. S., 401, and *ex parte* Newman, 114 U. S., 152, it is apparent that this court held that the territorial court had not acted judicially in that case or had abused discretion.

In *ex parte* Newman, 14 Wall., 153, this court was asked by mandamus to compel the judge of the U. S. circuit court for the eastern district of New York to reinstate an appeal and decide it on its merits. It appeared that the case was fully heard on its merits, but was finally decided on a question of jurisdiction which, when raised, became the primary question to be decided, and when held against the appellant there was no occasion for an opinion on the merits of the case. The writ was refused, Justice Clifford saying:

"The court did not refuse to entertain the appeal, nor did the court refuse to decide the case on the appeal, nor hold or decide that the circuit court had no jurisdiction to hear or decide the same as required by the proofs or the law; on the contrary, the court did entertain the appeal, did hear the counsel of all the parties fully on the questions raised in the case, and dismissed the appeal."

In *ex parte* Browne, 116 U. S., 401, this Court said:

"The dismissal of a cause by the supreme court of a territory can only be reviewed by a writ of error or appeal, as the case may be."

This is in the line of all the decisions, if *ex parte* Parker is not an exception, and is the law of the text books.

One eminent writer says:

"The writ of mandamus will not lie to compel subordinate courts to reinstate an appeal which they have dismissed, such dismissal whether made in accordance with a rule of practice of the inferior court not unlawful in itself or done in the exercise of judicial discretion is held equally beyond mandamus."

High on Extraordinary Leg. Rem., Sec. 247.

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